TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 485.

CLARENCE H. VENNER, APPELLANT,

vs.

GREAT NORTHERN RAILWAY COMPANY AND JAMES J. HILL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 12, 1907.

(20,898.)

(20,888.)

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1 Supreme Court of the State of New York, County of New York.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Defendants.

Summons.

Trial Desired in the County of New York.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated April 20th, 1906.

STEPHEN M. YEAMAN,
Plaintiff's Attorney.

Office and Post Office Address, No. 15 William Street, Borough of Manhattan, New York City.

2 Supreme Court of the State of New York, County of New York.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Defendants.

The plaintiff, suing for himself and all other stockholders of the defendant, Great Northern Railway Company, who are similarly situated, complains of the above named defendants, and for cause of action alleges:

1. That the defendant, Great Northern Railway Company, now is, and at all the times hereinafter stated was, a corporation organized by, and existing under the laws of the State of Minnesota.

2. That the Chicago, Burlington & Quincy Railroad Company, which is hereinafter referred to, now is, and at all of the times hereinafter stated was, a corporation organized by, and existing under the laws of the State of Illinois.

3. That the Northern Pacific Railroad Company which is hereinafter referred to, now is, and at all of the times hereinafter stated

was, a corporation organized by, and existing under the laws of the State of Wisconsin.

4. That this plaintiff now is, and at the date of the commencement of this action was, the lawful owner and holder of three
3 hundred (300) shares of the Preferred capital stock of said defendant, Great Northern Railway Company, and that said shares of stock then stood and now stand in the name of this plaintiff upon the stock book of said corporation defendant.

5. That this action is commenced and prosecuted by this plaintiff on his own behalf, and on behalf of and for the benefit of all other stockholders of said defendant Great Northern Railway Company, who may be situated similarly to this plaintiff, in respect to the said corporation defendant, and the cause of action which is herein set forth.

And further complaining this plaintiff alleges, upon information and belief, as follows:

6. That at all of the times hereinafter stated, the defendant, James J. Hill, was a director and the President of the defendant, Great Northern Railway Company, and dominated and controlled the said corporation defendant, and the Board of Directors thereof; and that at all of said times a great majority of the Board of Directors of said corporation defendant were employés of said corporation defendant and were subservient to the wishes of the defendant James J. Hill, in the discharge of their duties, as directors of the said corporation defendant.

7. That on or about November first, 1900, or shortly thereafter, the defendant, James J. Hill, then acting as a director and President of, and controlling and dominating the Board of Directors of the defendant Great Northern Railway Company, as aforesaid, conceived and undertook to carry out and put into effect a plan and design whereby the defendant, Great Northern Railway Com-
4 pany, should acquire a large interest in the capital stock of said Chicago, Burlington & Quincy Railroad Company. That in connection with the plan and design so conceived, the defendant, James J. Hill, in violation of his duty as such officer and director honestly, diligently and carefully to administer the affairs of the defendant, Great Northern Railway Company, and with knowledge of the plan and design last above set forth, conceived and undertook to carry out and put into effect, a wrongful and illegal plan and design to make a large profit for himself personally, at the expennse and to the loss of the said defendant corporation, by personally purchasing in the open market, or by causing to be purchased and held for him, and subject to his control, a large amount of the capital stock of the Chicago, Burlington & Quincy Railroad Company, at certain low prices, which were then prevailing, to wit: at from about $135. per share to about $165. per share, and by thereafter causing the same to be purchased or acquired by the defendant, Great Northern Railway Company, at the price of Two hundred dollars ($200) per share, under the offer which is hereinafter more particularly set forth, and which he then intended to

cause to be made by the above named defendant corporation in furtherance of the said wrongful and illegal scheme and design.

8. That thereafter, and between the first day of November, 1900, and the 20th day of April, 1901, the defendant James J. Hill, did as a part of and in furtherance of the wrongful scheme and design above set forth and while acting as President and Director as aforesaid, personally purchase or acquire, or caused to be purchased or acquired for him, and held in his interest and subject to his
5 control, at divers times and from divers persons, a great amount of the capital stock of said Chicago, Burlington & Quincy Railroad Company. That this plaintiff is unable to state just what amount of the said capital stock was so purchased and acquired by or for the said James J. Hill, or the exact prices at which the same was so purchased or acquired, but he alleges upon information and belief, that the par value of the said capital stock which was so purchased or acquired by or for him, or held subject to his control, exceeded in the aggregate, the sum of Twenty Five Million dollars ($25,000,000.) and that the same was so purchased or acquired at prices not exceeding an average of One Hundred and Fifty Dollars ($150.) per share, and with the preconceived and premeditated purpose and intent on the part of said James J. Hill that he would procure and cause the same to be bought by, and transferred to said Great Northern Railway Company at greatly advanced and increased prices, and in the manner which is hereinafter set forth.

9. That thereafter, and about the latter part of the month of April, 1901, the defendant, James J. Hill while acting as President and Director as aforesaid, and while dominating and controlling the Board of Directors of said Great Northern Railway Company, and as a part of, and in furtherance of the wrongful scheme and design which is above set forth, and in violation of his duty as a director and as President as aforesaid, did cause and procure said Great Northern Railway Company to join and co-operate with said Northern Pacific Railroad Company in making a joint offer
6 to the stockholders of the Chicago, Burlington & Quincy Railroad Company, through the President and Directors of said Company, to purchase at the price of Two Hundred Dollars ($200.) per share, all or any part of the capital stock, not less than two thirds, of said Chicago, Burlington & Quincy Railroad Company, including the stock which had been theretofore purchased or acquired by or for said James J. Hill, as is above set forth, the said consideration and purchase price for said shares of the capital stock to be paid by the issuance and delivery to said James J. Hill and other holders of such stock, at par, of the joint bonds, of the par value of One Thousand Dollars ($1,000.) each, of said Great Northern Railway Company, and said Northern Pacific Railway Company; that is to say, by the issuance and delivery of one of said bonds for each five shares of said capital stock. That the said offer was by said James J. Hill, so caused and procured to be made, with the preconceived intent and purpose that he might be enabled to

make large, wrongful and illegal personal profit and gain out of the said transaction.

10. That thereafter, and on or about the first day of July, 1901, the said James J. Hill, while acting as director and president as aforesaid, and exercising a dominating influence over the defendant Great Northern Railway Company and its directors, and as a part of, and in furtherance of the said wrongful scheme and design as above set forth, did sell and transfer, or cause to be sold and transferred to said Great Northern Railway Company, and did cause and procure said corporation defendant to purchase, upon the terms, at the price and for the consideration which are last above
7 set forth, a large amount of the shares of the capital stock of said Chicago, Burlington & Quincy Railroad Company, which had theretofore been purchased or acquired by, or for said James J. Hill, and which were then held and owned by or for him, or under his control; and that said James J. Hill did, while acting as director and President as aforesaid, make a very great, wrongful and illegal personal profit and gain out of said transaction, to the injury of said Great Northern Railway Company and its stockholders. That this plaintiff is unable to state the exact amount of the said capital stock of said Chicago, Burlington & Quincy Railroad Company which was so sold and transferred by or for said James J. Hill to said Great Northern Railway Company, or the exact amount of the wrongful and illegal gain and profit which was realized by said James J. Hill by and out of said transaction, but this plaintiff alleges upon information and belief, that the par value of all of the said shares of capital stock which were so sold and assigned as aforesaid, exceeded in the aggregate, the sum of Twenty-five Million Dollars ($25,000,000.) and that the said wrongful and illegal gain and profit which was so realized by said James J. Hill by and out of the said transaction amounted in the aggregate to more than Ten Million Dollars ($10,000,000.).

11. That on or about the 7th day of March, 1906, and before the commencement of this action, this plaintiff made a demand, in writing, upon the defendant Great Northern Railway Company, its directors and the defendant James J. Hill, as its President, that this or a like action be instituted by the said corporation defend-
8 ant, against said James J. Hill, the other defendant herein, for the relief which is prayed for in this complaint, and that the said corporation defendant, and its said Board of Directors, and the defendant James J. Hill, as its President, have all of them refused to comply with the said demand, and have refused and failed to commence, or cause to be commenced, any action whatever in compliance therewith.

That by reason of the premises, the defendant Great Northern Railway Company, and its stockholders have been greatly damaged, to wit; in the sum of more than Ten Million dollars ($10,000,000.).

Wherefore, the plaintiff prays for judgment,

1. That the defendant, James J. Hill, may be compelled to account to the above named defendant, Great Northern Railway Company, for the official conduct of said James J. Hill, as a Director and

as President of said corporation defendant, in respect to all of the matters which are in this complaint set forth, and to account for all gains and profits which have been realized by, or have accrued to him, said James J. Hill, personally, out of or as a result of the wrongful and illegal transactions or any of them, which are herein alleged and set forth.

2. That the defendant James J. Hill, may be compelled to pay to the defendant, Great Northern Railway Company, for the benefit of said corporation defendant, and of its creditors and stockholders, any and all moneys with interest thereon, for which he, said James J. Hill may, upon said accounting be found to be indebted to said corporation defendant.

9 3. For such other and further relief in the premises as may be just, together with the costs and disbursements of this action.

STEPHEN M. YEAMAN,
Attorney for Plaintiff.

Office and Post Office Address, 15 William Street, Borough of Manhattan, New York City.

STATE OF NEW YORK, *County of New York, ss:*

Clarence H. Venner being duly sworn, says, that he is the plaintiff in the above entitled action, that he has read the foregoing complaint, and that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

C. H. VENNER.

Sworn to before me this 2nd day of May, 1906.

JOHN J. O. REILLY,
Notary Public, Kings County.

Certificate filed in New York County.

(Endorsed:) Supreme Court of the State of New York: County of New York.—Clarence H. Venner, Plaintiff, *vs.* Great Northern Ry. Co. *et als.* Defendants.—Complaint.—Stephen M. Yeaman, Atty. for Plaintiff, 15 William St. Borough of Manhattan, New York City. Motion granted: the complaint does not comply with the 94th Rule. Oct. 19, 1906. E. H. Lacombe, U. S. C. J.

10 Supreme Court.

CLARENCE H. VENNER
against
GREAT NORTHERN RAILWAY COMPANY and Another.

Notice of Appearance for Great Northern Railway Company.

Take notice, that the defendant, Great Northern Railway Company hereby appears in the above entitled action and that we are

retained as attorneys for it therein, and hereby demand that a copy of the complaint, and of all other papers in this action be served on us, at our office, No. 44 Wall Street, New York City.

New York, May 10, 1906.

Yours, &c.,

SHEARMAN & STERLING,
Attorneys for Defendant, Great Northern Railway Company, 44 Wall Street, New York City.

To Stephen M. Yeaman, Esq., Attorney for Plaintiff.

(Endorsed:) Supreme Court.—Clarence H. Venner against Great Northern Railway Company and another.—Notice of Appearance for Great Northern Railway Company.—Shearman & Sterling, Attorneys for defendant, Great Northern Railway Company, 44 Wall Street, New York City.—Due service of copy of the within is hereby admitted. May 10, 1906. Stephen M. Yeaman, Plffs. Atty.

11 Supreme Court of the State of New York, New York County.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendant.

Notice of Appearance and Demand.

SIR: Please take notice, that the defendant James J. Hill hereby appear in this action; that we are retained as attorneys for said defendant herein, and that we demand that a copy of the complaint and of all papers herein be served upon us at our office, No. 62 Cedar Street, New York City.

Dated, New York May 3, 1906.

Yours, &c.,

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendant.

Office and Postoffice Address, 62 Cedar Street, New York City.

To Stepuen M. Yeaman, Attorney for Plaintiff 15 William St., New York City.

(Endorsed:) Supreme Court New York County.—Clarence H. Venner, Plaintiff, against Great Northern Railway Company and James J. Hill, Defendant.—Notice of Appearance and De-
12 mand.—Simpson, Thacher & Bartlett, Attorneys for Defendant, 62 Cedar Street, New York City.—Copy received May 5, 1906, Stephen M. Yeaman, Plff's att'y.

13 Supreme Court, State of New York, County of New York.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

To the Supreme Court of the State of New York:

Your petitioners, Great Northern Railway Company and James J. Hill, the defendants in the above entitled action, respectfully show to this Honorable Court as follows:

I. The above entitled suit is a suit of a civil nature in which the amount in dispute exceeds, exclusive of interest and cost, the sum of $2,000.

II. The above named plaintiff was at the time of the commencement of said suit, and still is, a citizen of the State of New York, residing in the Borough of Manhattan, City of New York in said State.

III. Your petitioner said Great Northern Railway Company at the time of the commencement of said suit was, and still is, a corporation duly organized and existing under the laws of the State of Minnesota, and consequently was at the time of beginning said suit, and now is, a citizen of the State of Minnesota.

14 IV. Your petitioner, said James J. Hill, at the time of the commencement of said suit was, and still is, a citizen of the State of Minnesota, residing in the city of St. Paul in said State.

V. Your petitioners are the only defendants in said suit, and consequently there is presented therein a controversy between citizens of different States.

VI. Your said petitioners are not required by the laws of the State of New York, or the rules of this court, to answer or plead to the complaint herein at any time before the 11th day of June, 1906.

VII. No previous application of this or a similar nature has been made herein.

Wherefore your petitioners pray that an order be made for the removal of said suit from this court to the United States Circuit Court in and for the Southern District of New York, and they hereby tender the requisite bond and security with good and sufficient surety, as required by law for the removal thereof, and pray this Honorable Court to proceed no further herein except to make such order of removal and to accept such bond and security and to cause the record herein to be removed to the United States Circuit Court in and for the Southern District of New York as aforesaid, and they will ever pray, etc.

Dated, June 6, 1906.

SHERMAN & STERLING,
Attorneys for Defendant Great Northern
15 *Railway Company, Petitioner Herein.*

Office & P. O. Address, 44 Wall Street, New York City.

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendant James J. Hill,
Petitioner Herein

Office & P. O. Address: 62 Cedar Street, New York City.

STATE OF NEW YORK, *County of New York, ss:*

Edward T. Nichols, being duly sworn, says: I am the Third Vice President of Great Northern Railway Company, one of the defendants in the above entitled action and one of the foregoing petitioners. The foregoing petition is true to my own knowledge, except as to the matters therein stated upon information and belief, and as to those matters I believe the same to be true. This verification is not made by said petitioner because it is a corporation.

EDWARD T. NICHOLS.

Sworn to before me this 6th day of June, 1906.
[L. S.] FRANCES M. KELLER,
Notary Public, N. Y. Co.

STATE OF NEW YORK, *County of New York, ss:*

James J. Hill, being duly sworn, says. I am one of the defendants in the above entitled action and one of the foregoing petitioners. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon in-
16 formation and belief, and as to those matters I believe it to be true.

JAS. J. HILL.

Sworn to before me this 6th day of June, 1906.
[L. S.] FRANCES M. KELLER,
Notary Public, N. Y. Co.

17 Supreme Court, New York County.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

Bond on Removal.

Know all men by these presents:

That we, Great Northern Railway Company and James J. Hill, principals, and the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 35 Wall Street, in the Borough of Manhattan, in the City of New York, surety, are held and firmly bound unto Clarence H. Venner in the sum of Five Hundred Dollars ($500.00) lawful money of the United States, to be paid to the said Clarence H. Venner, his heirs, executors, administrators, successors and assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the sixth day of June, Nineteen hundred and six.

Upon condition, nevertheless, that whereas, the said Great Northern Railway Company and James J. Hill have filed a petition in the Supreme Court, New York County, for the removal of a certain cause therein pending between the said Clarence H. Venner
18 as plaintiff, and the said Great Northern Railway Company and James J. Hill as defendants, to the Circuit Court of the United States, in and for the Southern District of New York.

Now, if the said Great Northern Railway Company and James J. Hill shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

[L. S.] GREAT NORTHERN RAILWAY CO.,
By EDWARD T. NICHOLS,
Third Vice President.

JAMES J. HILL. [L. S.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HUGH M. ALLWOOD, *Attorney-in-fact.*

[SEAL.] Attest:
JAMES R. KINGSLEY,
Attorney-in-Fact.

STATE OF NEW YORK, *County of New York, ss:*

On this 6th day of June, 1906, before me personally came Edward T. Nichols, to me known, who, being by me duly sworn did depose and say that he resided in New York, that he is the Third Vice-President of the Great Northern Railway Company,
19 the Corporation described in and which executed the above instrument, that he knew the seal of said Corporation; that the seal affixed to said instrument was such corporate seal, that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

[L. S.] FRANCES M. KELLER,
Notary Public, N. Y. Co.

STATE OF NEW YORK, *County of New York, ss:*

On this Sixth day of June, 1906, before me personally came James J. Hill, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

[L. S.] FRANCES M. KELLER,
Notary Public, N. Y. Co.

STATE OF NEW YORK, *County of New York, ss:*

On the sixth day of June, in the year 1906 before me personally came James R. Kingsley, to me known, who, being by me duly

sworn, did depose and say, that he resided in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal;
20 that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said James R. Kingsley further said that he was acquainted with Hugh M. Allwood, and knew him to be the Attorney-in-Fact of said Company; that the signature of the said Hugh M. Allwood, subscribed to the within instrument, was in the genuine handwriting of the said Hugh M. Allwood, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said James R. Kingsley.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company, in the City of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"Resolved, That in pursuance of Section eight hundred and eleven of the Code of Civil Procedure of the State of New York, Henry B. Platt, Vice-President, or George Sewell Bonner, Attorney, or Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood and James R. Kingsley, Attorneys-in-Fact of this Company, in the State of New York, be, and each of them is, hereby authorized and empowered to sign, execute and deliver any and all bonds or undertakings for or on behalf of this Company, and to attach thereto the seal of the corporation, the same to be
21 attested by the said George Sewell Bonner, Attorney of the Company, or by either one of the other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 6th day of June, 1906.

[SEAL.] JAMES R. KINGSLEY,
Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement December 30th, 1905.

Resources.		Liabilities.	
Real Estate	$757,000.00	Capital Stock	$2,000,000.00
Stocks and Bonds	3,451,925.00	Surplus and undivided Profits	2,726,700.56
Railroad Bonds	1,231,250.00	Premium Reserve Requirements	718,091.62
British Consols	239,500.00	Reserve for Contingent Claims	664,787.60
Net Premiums Due	102,875.62	Claims Adjusted (Checks out)	5,015.48
Cash in Bank, etc	367,943.19	Claims in Process of Adment	35,898.55
			$6,150,493.81

22 STATE OF NEW YORK, *County of New York, ss:*

James R. Kingsley, being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial conditon of said Company, as of December 30th, 1905, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 6th day of June, 1906.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

(Endorsed:) Supreme Court, State of New York, County of New York.—Clarence H. Venner, Plaintiff, against Great Northern Railway Company and James J. Hill, Defendants.—Bond.—Fidelity and Deposit Company of Maryland, 35 Wall Street, New York.—I approve of the within bond and of the sufficiency of the surety therein. Dated June 7/06. P. H. Dugro, Justice of the Supreme Court of the State of New York.

STATE OF NEW YORK, *County of New York, ss:*

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, that I have compared the preceding with the original record on removal to U. S. Court. Clarence H. Venner *vs.* Great Northern Railway Company and James J. Hill on file in my office and that the same
23 is a correct transcript therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 11th day of Oct., 1906.

[SEAL.] PETER J. DOOLING, *Clerk.*

(Endorsed:) United States Circuit Court. Southern District of New York.—Clarence H. Venner, Plaintiff, against Great Northern Railway Company and James J. Hill, Defendants.—Record on Removal.—I approve of the within Bond and of the Sufficiency of the Sureties thereon. Dated, June 7th, 1906. P. H. Dugro, Justice of the Supreme Court of the State of New York.—U. S. Circuit Court. Southern District New York. Filed Oct. 16, 1906, John A. Shields, Clerk.

23½ United States Circuit Court, Southern District of New York.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Defendants.

SIR: Please take notice, that on the complaint herein the defendants above named will, on the 19th day of October, 1906, at the opening of Court, or as soon thereafter as counsel can be heard, move the Court for an order requiring the plaintiff to replead according to the forms and practice prevailing in equity.

Dated New York, October 15th, 1906.

Yours etc.,

SHEARMAN & STERLING,
Attorneys for Defendant, Great Northern Railway Company.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, City of New York.

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendant, James J. Hill.

Office and Post Office Address, 62 Cedar Street, Borough of Manhattan, City of New York.

To Stephen M. Yeaman, Esq., Attorney for Plaintiff, 15 Wall Street, New York.

(Endorsed:) United States Circuit Court, Southern Dist. of New York.—Clarence H. Venner, Plaintiff, against Great Northern Railway Company and James J. Hill, Defendants. Notice of motion.—Simpson, Thacher & Bartlett, Attorneys for Def't James J. Hill, 62 Cedar Street, New York City.—U. S. Circuit Court, Southern District New York. Filed Oct. 19, 1906, John A. Shields, Clerk.

24 At a Stated Term of the Circuit Court of the United States held in and for the Southern District of New York, at the Post-office Building, in the City of New York, on the 25 day of October, 1906.

Present: Hon. E. Henry Lacombe, Judge.

In Equity.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Defendants.

The motion of the defendants Great Northern Railway Company and James J. Hill that the plaintiff be required to replead according to the forms and practice prevailing in equity having duly come on to be heard on the 19th day of October, 1906; after hearing Julius F. Workum, Esq., of counsel, in support thereof, and Stephen M. Yeaman, Esq., of counsel, in opposition thereto,

On motion of Shearman & Sterling, solicitors for defendant Great Northern Railway Company, and Simpson, Thacher & Bartlett, solicitors for defendant James J. Hill, it is

Ordered that the plaintiff replead the complaint herein according to the forms and practice prevailing in equity, within twenty days from the date of the notice of entry of this order.

E. H. LACOMBE,
U. S. Circuit Judge.

25 (Endorsed:) United States Circuit Court. Southern District of New York.—Clarence H. Venner, Plaintiff, against Great Northern Railway Company and James J. Hill, Defendants.—Order.—Simpson, Thacher & Bartlett, Attorneys for Defendant James J. Hill, 62 Cedar Street, New York City.—Approved as to form only, Stephen M. Yeaman, Solicitor for Compl't.—U. S. Circuit Court, Southern District New York. Filed Oct. 25 1906, John A. Shields, Clerk.

26 Circuit Court of the United States in and for the Southern District of New York. In Equity.

CLARENCE H. VENNER, Plaintiff,
vs
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York:

Clarence H. Venner, who is a citizen of the State of New York, and residing in the Borough of Manhattan, in the City, County and State of New York, suing for himself and for the benefit of the Great Northern Railway Company, and all other stockholders of said corporation defendant who are similarly situated, brings this his bill against Great Northern Railway Company, a corporation organized by, and existing under the laws of the State of Minnesota, and having its principal office in the City of St. Paul, in the State of

Minnesota, and James J. Hill, who is a citizen of said State of Minnesota, and a resident of said City of St. Paul, in said State of Minnesota; and thereupon, your orator, humbly complaining, alleges:

First. That the amount in controversy herein exceeds the
27 sum of two thousand dollars ($2,000) exclusive of interest and costs.

Second. That the Chicago, Burlington & Quincy Railroad Company, which is hereinafter referred to, now is, and at all of the times hereinafter stated was, a corporation organized by, and existing under the laws of the State of Illinois, and on or about the first day of April, 1901, had a capital stock issued and outstanding of about $110,000,000.

Third. That the Northern Pacific Railway Company, which is hereinafter referred to, now is, and at all of the times hereinafter stated was, a corporation organized by and existing under the laws of the State of Wisconsin.

Fourth. That your orator now is, and on and before the date of the demand which is hereinafter referred to, was the lawful owner and holder of three hundred (300) shares of the preferred capital stock of the defendant Great Northern Railway Company, being of the par value of one hundred dollars ($100) per share, and of the present market value of about one hundred thousand dollars ($100,000), and that the said shares of stock then stood, and now stand in the name of your orator upon the stock books of said Great Northern Railway Company.

And further complaining your orator alleges upon information and belief:

Fifth. That at all of the times hereinafter stated, the defendant James J. Hill was a director and president of the defendant, Great Northern Railway Company, and dominated and controlled the said corporation defendant, and the board of directors thereof; and that at all of said times a great majority of the board of directors of said corporation defendant were employees of said cor-
28 poration defendant, and were subservient to the wishes of the defendant James J. Hill, in the exercise of their official powers as directors and employees of said corporation defendant.

Sixth. That on or about November 1, 1900, or shortly thereafter, the defendant James J. Hill, then acting as a director and president of, and controlling and dominating the board of directors of the defendant Great Northern Railway Company as aforesaid, together with other persons to this plaintiff unknown, conceived and undertook to carry out and put into effect a plan and design whereby the defendant, Great Northern Railway Company and the Northern Pacific Railway Company should jointly acquire a large and controlling interest in the capital stock of said Chicago, Burlington & Quincy Railroad Company. That in connection with the plan and design so conceived, the defendant James J. Hill, in violation of his duty as such officer and director honestly, diligently and carefully to administer the affairs of the defendant, Great Northern Railway Company, and with knowledge of the plan and design above stated,

conceived and undertook to carry out and put into effect, a wrongful and illegal plan and design to make a large profit for himself personally, at the expense and to the loss and damage of the said defendant corporation, by personally purchasing, or by causing to be purchased and held for him, and subject to his control, a large amount of the capital stock of the Chicago, Burlington & Quincy Railroad Company, at the prices then prevailing, to wit: at from about $135 per share to about $185 per share, and by thereafter causing the same to be purchased or acquired by the defendant, Great Northern Railway Company, and the said Northern Pacific Railway Company, at the price of two hundred dollars ($200) per share, under the offer
29 which is hereinafter more particularly set forth, and which he then, at the time of said purchase of such stock, intended to cause to be made by the above named defendant Great Northern Railway Company and said Northern Pacific Railway Company in furtherance of the said wrongful and illegal scheme and design.

Seventh. That thereafter, and between about the first day of November, 1900, and the 20th day of April, 1901, the defendant James J. Hill, as a part of, and in furtherance of the wrongful scheme and design above set forth, and while acting as president and director as aforesaid, at divers times and from divers persons, personally purchased or acquired, or caused to be purchased or acquired for him, and to be held in his interest and subject to his control, a large amount of the capital stock of said Chicago, Burlington & Quincy Railroad Company. That your orator is unable to state just what amount of the said capital stock was so purchased and acquired by or for the said James J. Hill, or the exact prices at which the same was so purchased or acquired, but he alleges upon information and belief, that the par value of the said capital stock which was so purchased or acquired by or for him, or held subject to his disposition and control, exceeded in the aggregate the sum of Twenty-five million dollars ($25,000,000), and that the same was so purchased or acquired with the preconceived and premeditated purpose and intent on the part of said James J. Hill that he would procure and cause the same, or a large interest therein, to be bought by, and transferred to said Great Northern Railway Company at greatly advanced and increased prices, and in the manner which is hereinafter set forth.

Eighth. That thereafter, and on or about the latter part of the month of April, 1901, the defendant James J. Hill while
30 acting as president and director as aforesaid, and while dominating and controlling the Board of Directors of said Great Northern Railway Company, and as a part of, and in furtherance of the wrongful scheme and design which is above set forth, and in violation of his duty as a director and as president as aforesaid did cause and procure said Great Northern Railway Company to join and co-operate with said Northern Pacific Railway Company in making a joint offer to the stockholders of the Chicago, Burlington & Quincy Railroad Company, through the president and directors of said last named company, to purchase at the price of two hundred dollars ($200) per share, all or any part of the capital

stock, not less than two-thirds of said Chicago, Burlington & Quincy Railroad Company, as is above set forth, the said consideration and purchase price for said shares of the capital stock to be paid by the issuance and delivery to the holders of such stock, of the collateral trust bonds to be made and issued jointly by the Great Northern Railway Company and the Northern Pacific Railway Company at par; that is to say, by the issuance and delivery of one of said bonds of the par value of one thousand dollars ($1,000), for each five shares of said capital stock; with an option to the stockholders to accept for each share of stock $160 in bonds and $40 in cash, or, to a limited extent, $200 in cash for each share, the total amount payable in cash under such options being limited to $50,000,000. That said offer was by said James J. Hill so caused and procured to be made, with the preconceived intent and purpose that he might be enabled to make large, wrongful and illegal personal profit and gain out of said transaction.

Ninth. That thereafter, and on or about the first day of July, 1901, the said James J. Hill, while acting as director and
31 president as aforesaid, and exercising a dominating influence over the defendant Great Northern Railway Company and its directors, and as a part of and in furtherance of the said wrongful scheme and design as above set forth, did sell and transfer, or cause to be sold and transferred to said Great Northern Railway Company and said Northern Pacific Railway Company jointly, and did cause and procure said corporation defendant and said Northern Pacific Railway Company to purchase upon the terms, at the price and for the consideration last above set forth a large amount of the shares of the capital stock of said Chicago, Burlington & Quincy Railroad Company, including the stock which had theretofore been purchased or acquired by or for said James J. Hill and which was then held and owned by him, or held for him or under his control; and that said James J. Hill, while acting as director and president as aforesaid, did make and acquire a very great, wrongful and illegal personal profit and gain out of said transaction, to the injury of said Great Northern Railway Company and its stockholders. That the said Great Northern Railway Company then acquired and now retains and possesses an undivided one-half interest in all of the said shares of stock of the Chicago, Burlington & Quincy Railroad Company which had been jointly purchased by said Great Northern Railway Company and said Northern Pacific Railway Company as aforesaid, to wit: 1,075,772 shares, of the aggregate par value of $107,577,200. Said joint collateral trust bonds were issued and used by said companies in acquiring capital stock of said Chicago, Burlington & Quincy Railroad Company, and were then and are now worth and selling on the market at about par. That your orator is unable to state the exact amount of the interest or share of said Great Northern Railway Company in the said capital stock of said Chicago, Burlington & Quincy Railroad Company which
32 was so sold or transferred by or for said James J. Hill to said Great Northern Railway Company and said Northern Pacific Railway Company jointly, or the exact amount of the wrongful

and illegal gain and profit which was realized by said James J. Hill by and out of said transaction, but your orator alleges, upon information and belief, that the par value of the interest or share of said Great Northern Railway Company in the said shares of the capital stock which were so sold and assigned as aforesaid, and which said Hill owned or controlled at the time of said sale, exceeded in the aggregate the sum of twenty-five million dollars ($25,000,000), and that the said wrongful and illegal gain and profit which was so realized by said James J. Hill by and out of the said transaction amounted in the aggregate to more than ten million ($10,000,000) dollars.

Tenth. That on or about the 7th day of March, 1906, and before the commencement of this action, your orator made a demand in writing upon the defendant Great Northern Railway Company, its directors and the defendant James J. Hill as its president, that this or a like action be instituted by the said corporation defendant against said James J. Hill, the other defendant herein, for the relief which is prayed for in this complaint, and that the said corporation defendant and its Board of Directors and the defendant James J. Hill, as its president, have all of them refused to comply with the said demand, and have refused and failed to commence, or cause to be commenced, any action whatever in compliance with such demand.

Eleventh. All which actings, doings and dealings of the said defendant James J. Hill are contrary to equity and good conscience, and tend to the manifest damage, wrong, injury and oppression of your orator, and the defendant Great Northern Railway Com-
33 pany and its stockholders in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, your orator brings this his bill against the said defendants.

Twelfth. To the end, therefore, that the said defendant James J. Hill may, if he can, show why this Court should not grant the relief which is hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set out, as by the note hereinafter written he is required to answer severally and respectively, that is to say:

1. Did you between November 1, 1900, and July, 1901, buy or own, or cause to be bought or held for your account and order, or have any interest in, any of the shares of the capital stock of the Chicago, Burlington & Quincy Railroad Company?

If you answer in the affirmative, state when, how many shares and at what prices they were bought?

2. Did you belong to, or were you interested in, any firm, syndicate or corporation which, between November 1, 1900, and July, 1901, bought, acquired or held any shares of such stock?

If so, state how many shares did they or it buy, when and at

what prices, and what was your interest in such syndicate or combination, or either of them?

3. Was any such stock which had been bought by you, or for your account, or by any such syndicate, firm or corporation in which you were interested, afterwards sold, transferred or delivered
34 by you, or by such firm, syndicate or corporation, to the Great Northern Railway Company or the Northern Pacific Railway Company, or to both of said companies jointly, or to any trustee for said companies or for either of them?

4. If you answer interrogatory number 3 in the affirmative, state how many shares were so sold or transferred, when and to whom the same were sold or transferred, at what prices, and in what form payment therefor was made?

5. Do you now own, or have you ever owned, any of the joint collateral trust bonds of the Great Northern Railway Company and the Northern Pacific Railway Company, or does any person, firm or corporation hold for your account any of such bonds?

6. If you answer interrogatory number 5 affirmatively, state (1) when were such bonds issued or delivered to you, or for your account, or to any syndicate, firm or corporation in which you were interested; (2) what amount in par value of such bonds were included in such deliveries; (3) were they, or any of them, a part of the issue of such bonds used in payment by said companies for the stock of the said Chicago, Burlington & Quincy Railroad Company?

7. Do the Great Northern Railway Company and the Northern Pacific Railway Company now jointly own, or did they ever acquire any of the capital stock of the Chicago, Burlington & Quincy Railroad Company?

8. If you answer interrogatory number 7 affirmatively, state in detail: (1) When and how many of such shares of stock were so acquired, and what interest therein by the Great Northern Railway Company; (2) from what holders such shares were pur-
35 chased and in what quantities; (3) were all such shares paid for with the joint collateral trust bonds of the Great Northern Railway Company and Northern Pacific Railway Company; (4) if any were paid for partly or wholly in cash, state the number of shares so purchased, from whom purchased, and what portion of such stock was paid for partly in cash at $40 per share and $160 in bonds, and what portion was paid for wholly in cash at $200 per share; (5) did such stock so bought with cash or bonds embrace any shares thereof which were then owned, or which stood in your name, or were held for your account and order, or in which you were interested as part owner, either directly or as a member of any syndicate, and if so, to what extent for cash and to what extent for bonds?

9. If the delivery to the Great Northen Railway Company and the Northern Pacific Railway Company, or any trustees for said companies, or the shares of stock of the Chicago, Burlington & Quincy Railroad Company, which were so acquired by the Great Northern Railway Company and the Northern Pacific Railway Company, and the delivery of the joint collateral trust bonds of the

Great Northern Railway Company and the Northern Pacific Railway Company, or the delivery of any part of such stocks or bonds, was affected through or by any agent, firm, trust company or corporation, state the name and address of such agent, firm, trust company or corporation, and state whether through that agency you received, or any one received for your account and order, any of the above described collateral trust bonds, and if so, how many thereof?

10. Were you at any time interested in, or a member of any syndicate formed for the purpose of underwriting any of the said joint collateral trust bonds issued by the Great Northern Railway Company and Northern Pacific Railway Company?

36 11. If you answer in the affirmative, state the amount for which such syndicate was formed, the amount of your interests therein, the names of the other members of, or participants in said syndicate, the names of the managers of said syndicate, the amount of money paid by or for you on account of your interest in such syndicate, the amount of such bonds which were delivered to you, or for your account, or sold by any such syndicate for your account, or on account of your interest in such syndicate, the amount of commissions paid to the subscribers or participants in such syndicate, or the managers thereof for such underwriting, by each of the Great Northern and Northern Pacific Railway Companies, and the amount paid to, or realized by you or any one else for your account, for or as profits on your interest in such syndicate?

12. Did you at any time sell to such underwriting syndicate, or was there delivered to it for your account and benefit, or were you interested in any stock of the Chicago, Burlington & Quincy Railroad Company which was delivered or sold to such syndicate for cash, and if so, state the amount of such stock and the prices for it, and the dates and amounts of said deliveries.

13. Are you now president of the Great Northern Railway Company? If you answer in the affirmative state how long you have continuously been such president?

14. Are you now a member of the Board of Directors of said Great Northern Railway Company, and if so, state how long you have continuously been such a director, and whether you were such director during the years 1900 and 1901?

15. State whether you are now a director or officer of the Northern Pacific Railway Company, and if you answer in the affirmative, state how long you have continuously been such a director

37 or officer, and whether you were a director or officer in the years 1900 and 1901?

16. State when you first conceived, or when was first proposed or suggested to you, the plan or scheme of having the Great Northern Railway Company and the Northern Pacific Railway Company acquire or purchase any part or all of the capital stock of the Chicago, Burlington & Quincy Railroad Company at $200 per share, payable in the joint collateral trust bonds above described?

17. State what was the aggregate par value of the shares of the

capital stock of the Chicago, Burlington & Quincy Railroad Company which were actually sold and transferred to the Great Northern Railway Company and the Northern Pacific Railway Company, or to any trustee for said companies, for and in consideration of the issuance and delivery of the joint collateral bonds of the said two last named railway companies, and also state the amount of said stock paid for in cash and at what prices, and state what proportion of the shares of stock then so purchased was acquired by or delivered to, the Great Northern Railway as a result of said transaction?

18. State who were the directors of the Great Northern Railway Company during the years 1900 and 1901, and what directors held offices other than that of director, in said company, and what offices. Also state what directors and officers of those years were related to you or connected with you by affinity?

19. Answer the last above interrogatory as to the year 1906?

20. Name the officers or directors of the Chicago, Burlington & Quincy Railroad Company with whom you had the negotiations which resulted in the offer by the Great Northern Railway
38 Company and Northern Pacific Railway Company for the purchase of the capital stock of the Chicago, Burlington & Quincy Railroad Company set forth in the circular letter signed Francis W. Hunnewell, chairman, dated April 29, 1901, if the said negotiations were conducted by you, and if they were not conducted by you state by whom they were conducted, and annex hereto a copy of the letter containing the offer made by the Great Northern Railway Company and the Northern Pacific Railway Company, and a copy of the said circular of April 29, 1901?

21. State the names of the persons other than yourself, who represented the Great Northern Railway Company and the Northern Pacific Railway Company at any and all times during the negotiations had with the directors or officers of the Chicago, Burlington & Quincy Railroad Company having reference to the purchase of the capital stock of the last named company by the Great Northern Railway Company and the Northern Pacific Railway Company?

22. State when, where, and whether by correspondence or in person, the negotiations for the purchase of the Chicago, Burlington & Quincy Railroad Company stock by the Great Northern Railway Company and the Northern Pacific Railway Company were conducted?

23. If in answer to interrogatory number 22, you state that there was correspondence, annex hereto copies of such correspondence had between you and others, and all other correspondence on the subject, of which you may have, or can obtain copies?

24. State whether or not during the progress of the negotiations referred to in previous interrogatories, you in any manner represented to any of the directors or officers of the Chicago, Burlington & Quincy Railroad Company that you then owned, con-
39 trolled or otherwise represented any interest in the capital stock of the Chicago, Burlington & Quincy Railroad Company, and if so, to whom?

25. If you answer interrogatory number twenty-four in the affirmative, state fully what interest in the stock of the Chicago, Burlington & Quincy Railroad Company you claimed to represent, either by ownership, control or otherwise, and in what manner and to what extent you claimed ownership, control or representation of such stock, and when you acquired it?

Thirteenth. That this action was originally instituted in the Supreme Court of the State of New York, and while it was so pending therein the defendants appeared therein by their respective solicitors, and afterwards on their joint petition, the action was removed into this Court, and this bill is now filed in pursuance of the order of this Court, made and entered herein on the motion of the defendants, on the 25th day of October, 1906, and the parties being all before the Court, the issue and service of subpœnas is unnecessary.

To the end, therefore, that your orator and the defendant, Great Northern Railway Company, and the other stockholders of said corporation may have that relief which they can obtain only in a court of equity, which may be just and proper under the circumstances of the case, your orator prays:

First. That the defendants may be required to answer this bill of complaint, but without oath, all answers under oath being expressly waived, except the answers of the defendant James J. Hill to the interrogatories which are propounded in the twelfth paragraph of this bill.

Second. That the defendants may be required to discover and produce the original documents and papers, to wit:

40 1. Circular letter dated April 29, 1901, addressed to the stockholders of the Chicago, Burlington & Quincy Railroad Company, signed Francis W. Hunnewell, chairman.

2. A copy of the proposition of the Great Northern Railway Company and Northern Pacific Railway Company for the purchase of Chicago, Burlington & Quincy Railroad Company stock, referred to in the circular letter of April 29, 1901, above described.

3. Copy of the agreement between the Great Northern Railway Company and the Northern Pacific Railway Company and a syndicate of which J. P. Morgan & Company were managers, having reference to the sale of fifty million (50,000,000) dollars of Great Northern Railway Company and Northern Pacific Railway Company joint collateral trust bonds.

Third. That the defendant James J. Hill may be ordered to account to the above named defendant Great Northern Railway Company, for his official conduct as a director and as president of the defendant Great Northern Railway Company, in respect to all of the matters which are in this complaint set forth, and to account for all gains and profits which have been realized by, or have accrued to him, said James J. Hill personally, out of, or as a result of the wrongful and illegal transactions or any of them, which are herein alleged and set forth.

Fourth. That the defendant James J. Hill, may be decreed to pay to the defendant Great Northern Railway Company for the

benefit of said defendant and of its creditors and stockholders, any and all moneys with interest thereon, for which he, said James J. Hill may, upon said accounting be found and held to be liable to said Great Northern Railway Company by reason of the premises, and further to stand to, and abide such further order, di-
41 rections or decrees therein as to this Court shall seem meet.

STEPHEN M. YEAMAN,
Solicitor and of Counsel for Plaintiff,
15 William Street, New York City.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Clarence H. Venner, being first duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. C. H. VENNER.

Sworn to before me and subscribed in my prescence this 9th day of November, 1906.

JOHN J. O'REILLY,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

NOTE.—The defendant James J. Hill is required to answer under oath, each of the interrogatories contained in the foregoing bill of complaint, and numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25.

STEPHEN M. YEAMAN,
Solicitor and of Counsel for Plaintiff.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Nov. 9, 1906. John A. Shields, Clerk.

42 Circuit Court of the United States for the Southern District of New York. In Equity.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Defendants.

Demurrer to Amended Bill of Complaint.

Demurrer of the Great Northern Railway Company, one of the above-named defendants, to the amended bill of complaint of Clarence H. Venner, complainant, filed herein pursuant to an order of this Court, dated October 25, 1906.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of com-

plaint to be true, in such manner and form as the same are therein set forth and alleged, demurs to the said amended bill of complaint, and for cause of demurrer shows:

I. That it appears by the complainant's own showing, in and by the said amended bill of complaint, that he is not entitled to the relief prayed by the said amended bill of complaint, or to any relief, against this defendant, as to the matters contained in the said amended bill of complaint, or as to any of such matters.

II. That it appears by the complainant's own showing, in and by the said amended bill of complaint, that he is not entitled, in equity, to any relief against this defendant as to the matters contained in the said amended bill of complaint, or as to any of such matters.

43 Wherefore, and for divers other good causes of demurrer appearing upon the face of the said amended bill, this defendant demurs thereto, and humbly demands the judgment of this Court, whether it shall be compelled to make any further or other answer to the said amended bill or to any matters or things therein contained, and humbly prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

New York, January 7, 1907.

SHEARMAN & STERLING,
Solicitors for Defendant Great Northern Railway Co., 44 Wall Street, New York City.

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Edward T. Nichols, being duly sworn, says: That he is the Secretary of the Great Northern Railway Company, one of the defendants herein and the defendant named in the foregoing demurrer, and that the said demurrer is not interposed for the purpose of delay.

EDW. T. NICHOLS.

Sworn to before me, January 7, 1907.
[SEAL.]
JOHN G. SAXE,
Notary Public, New York County.

I hereby certify, that, in my opinion, the foregoing demurrer is well founded in point of law.

JOHN A. GARVER,
Of Counsel for Defendant Great Northern Railway Company.

(Endorsed:) U. S. Circuit Court Southern District New York. Filed Jan. 10 1907. John A. Shields, Clerk.

44 Circuit Court of the United States for the Southern District of New York. In Equity.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Defendants.

The demurrer of James J. Hill, one of the defendants above named, to the amended bill of complaint of Clarence H. Venner, the above named complainant, filed herein in pursuance of the order of this Court, made and entered herein on the 25th day of October, 1906.

This defendant, by protestation, not confessing or acknowledging all, or any of the matters and things, in said complainant's amended bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demurs thereto upon the following grounds:

1. Said complainant has not in said amended bill of complaint made or stated any such cause as ought to entitle him to any relief in equity, or to any relief as is thereby sought and prayed for, from or against this defendant.

2. It appears upon the face of said bill that nothing therein states facts sufficient to constitute a cause of action against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said amended bill of complaint, this defendant demurs thereto, and humbly prays the judgment of this Honorable
45 Court whether he shall be compelled to make any further or other answer to said bill of complaint or any matters and things therein contained, and prays to be hence dismissed with his costs and charges in this behalf sustained.

SIMPSON, THACHER & BARTLETT,
Solicitors for Defendant James J. Hill.

Office and Post-office Address, 62 Cedar Street, Borough of Manhattan, New York City.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in law.

JULIUS F. WORKUM,
Of Counsel for Defendant James J. Hill.

STATE OF MINNESOTA, *County of Ramsey, ss:*

James J. Hill, being duly sworn, says:

I am one of the defendants in the above-entitled action. The foregoing demurrer is not interposed for the purpose of dela- I have no reason to delay said action, and said demurrer is interposed to avoid the loss of time and expense of trial, and for no other reason, because I neither conceived nor undertook to carry out, or put into

effect, a wrongful or illegal plan or design to make a large profit, or any profit, for myself personally at the expense or to the loss or damage of the Great Northern Railway Company, by either personally purchasing, or by causing to be purchased or held for me or subject to my control, any capital stock of the Chicago, Burlington & Quincy Railroad Company, or by causing any stock of that company to be purchased or acquired by defendant the Great Northern Railway Company and the Northern Pacific Railway
46 Company, or either thereof, under the offer mentioned in said amended bill of complaint, or any other offer. I never purchased, or acquired, or bought, or caused to be bought or purchased or acquired, for me or to be held in my interest or subject to my control, any capital stock of the Chicago, Burlington & Quincy Railroad Company. I did not sell, transfer, or cause to be sold or transferred, to the Great Northerd Railway Company and the Northern Pacific Railway Company, or either thereof, any of the capital stock of the Chicago, Burlington & Quincy Railroad Company belonging to me, for I neither owned nor was interested in any such stock. No capital stock of the Chicago, Burlington & Quincy Railroad Company purchased by said Great Northern Railway Company and said Northern Pacific Railway Company, or either of them, was controlled by me, or held by me, or was under my control, and I never made or acquired any personal profit whatsoever from the sale of any stock of the Chicago, Burlington & Quincy Railroad Company bought by said Great Northern Railway Company and said Northern Pacific Railway Company, or either of them.

JAS. J. HILL.

Sworn to before me this 7th day of January, 1907.

[SEAL.] EARLE W. McELROY,
Notary Public, Ramsey County, Minn.

My commission expires April 14, 1911.

(Endorsed:) U. S. Circuit Court. Southern District New York. Filed Jan. 10 1907. John A. Shields, Clerk.

47 Circuit Court of the United States, Southern District of New York.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and Ano., Defendants.

Affidavit of Service.

STATE OF NEW YORK, *Southern District of New York, ss:*

William A. Tenney, being duly sworn says: I am over twenty-one years of age. On the 23d day of March, 1907, I served the annexed notice of motion on Messrs. Shearman & Sterling, the Solic-

itors for the defendant Great Northern Railway Company, by delivering a copy of said notice to and leaving the same with a person in and in charge of the office of said solicitors at No. 44 Wall Street, in the Borough of Manhattan, in the City of New York, during the absence of said solicitors from their said office.

WILLIAM A. TENNEY.

Sworn to before me this 25th day of March, 1907.

[SEAL.] SUTHERLAND H. HAXTUN,
Notary Public.

Cert. filed in N. Y. Co.

48 Circuit Court of the United States, Southern District of New York.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

SIRS: You will please take notice that upon the record on removal herein and the bill of complaint filed in this Court, I shall move this Court at a Stated Term thereof, to be held for rehearing of motions on March 29th, 1907, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order remanding this cause to the Supreme Court of the State of New York in and for the County of New York, from which Court it was attempted to be removed for the following reasons and upon the following grounds, to wit:

1st. That the requisite diverse citizenship required as a condition precedent to the jurisdiction of this Court in a controversy of the character presented by the record, does not exist.

2nd. That the record in this cause does not present a case removable from the State Court to this Court under the statutes governing such cases.

3rd. That this Court has no jurisdiction of this action under said attempted removal.

4th. That this Court is without jurisdiction to hear and determine this cause.

5th. For other reasons apparent upon the face of the record and to be assigned in argument.

49 Wherefore the complainant prays that this cause may be remanded to the Supreme Court of the State of New York for the County of New York to be there proceeded with according to the practice governing such cases.

Dated New York, March 21st, 1907.

STEPHEN M. YEAMAN,
Solicitor for Complainant, 15 William Street,
Borough of Manhattan, New York City.

To Messrs. Simpson, Thacher & Bartlett, Solicitor- for Defendant, James J. Hill.

To Messrs. Shearman & Sterling, Solicitors for Defendant, Great Northern Railway Company.

(Endorsed:) Circuit Court of the United States, In and for the Southern District of New York.—Clarence H. Venner, Plaintiff, against Great Northern Railway Company and James J. Hill, Defendants.—Notice of Motion to Remand.—Stephen M. Yeaman, Solicitor for Complainant, 15 William Street, Borough of Manhattan, New York City.—Copy received March 23rd, 1907. Simpson, Thacher & Bartlett, Attorneys for Def't Hill.—Motion denied. March 30, 1907. E. H. Lacombe, U. S. C. J.—U. S. Circuit Court, Southern District New York, Filed Mar. 30, 1907, John A. Shields, Clerk.

50 At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York at the Post-office Building, in the City of New York, on the 1st day of April, 1907.

Present: Hon. E. Henry Lacombe, Judge.

In Equity.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

The motion of the complainant for an order remanding this cause to the Supreme Court of the State of New York in and for the County of New York for the reasons and upon the grounds stated in his notice of motion served on the defendants on the 23rd day of March, 1907, having duly come on to be heard on the 30th day of March, 1907; after hearing Abram J. Rose, of counsel, in support thereof, and Messrs. Shearman & Sterling, solicitors for the defendant Great Northern Railway Company, and Messrs. Simpson, Thacher & Bartlett, solicitors for the defendant James J. Hill, appearing in opposition thereto;

On motion of Shearman & Sterling, solicitors for defendant Great Northern Railway Company, and Simpson, Thacher & Bartlett, solicitors for defendant James J. Hill, it is ordered that said motion be, and it hereby is, in all respects denied.

E. H. LACOMBE,
U. S. Circuit Judge.

51 (Endorsed:) United States Circuit Court, Southern District of New York.—Clarence H. Venner, Complainant, against Great Northern Railway Company and another, Defendants.—Order.—Simpson, Thacher & Bartlett, Attorneys for defendant James J. Hill, 62 Cedar Street, New York City.—U. S. Circuit Court, Southern District New York. Filed Apr. 1, 1907, John A. Shields, Clerk.

52 Circuit Court of the United States, Southern District of New York.

CLARENCE H. VENNER
vs.
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL.

Demurrer to amended bill of complaint in equity on the ground that on the complainant's own showing he is not entitled, in equity, to the relief demanded, or to any relief, as to any of the matters alleged or contained in such bill of complaint.

Stephen M. Yeaman with Abram J. Rose And Alfred C. Pette, Of Counsel for Complainant.

Shearman & Sterling for Great Northern Railway Company.

Simpson, Teacher & Bartlett, with J. F. Workum and Millard C. Humstone of Counsel for James J. Hill.

RAY, *District Judge:*

The complainant, Clarence H. Venner, is a citizen and a resident of the State of New York; defendant, Great Northern Railway Company, is a corporation organized and existing under the laws of the State of Minnesota, and defendant James J. Hill is a citizen and resident of said State of Minnesota. The amount involved, exclusive of interest and costs, is upwards of two thousand dollars. The bill of complaint alleges in substance, that in and about November, 1900, the defendant James J. Hill, then being a director in and president of the Great Northern Railway Company, and in acting as such and in violation of his trust and duty as such and to the great damage and injury to said Railway Company and its stockholders, did certain acts, fully stated, which if done
53 created a cause of action in equity which said Great Northern Railway Company might have maintained against said Hill. The bill of complaint then alleges that on or about March 6, 1907, the complainant, a stockholder in said corporation, made a demand upon it, its directors and president that this or a like action be instituted against said James J. Hill for the relief demanded in this action and that they neglected and refused to institute such action. The bill of complaint also alleges that complainant now is, and that "on and before the date of demand," the demand just stated, the complainant was the owner of 300 shares of the preferred capital stock of said corporation of the par value of $100 per share and of the present market value of about $100,000. Complainant brings suit on behalf of himself and all others similarly situated demanding that said Hill be required to account and pay over to the corporation for its benefit and the benefit &c. of its creditors and stockholders. The bill of complaint contains no allegation or statement that the complainant was a stockholder or shareholder in the Great Northern Railway Company at the time of the transactions complained of, or that his shares have devolved upon him since that time by operation of law. There are no al-

legations from which we may legally even infer that such are the facts. Hence the amended bill of complaint fails to comply with the 94th Rule of Equity Practice, (See 104 U. S. IX) promulgated January 23, 1882, and which provides:

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on
54 the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

This action was commenced in the Supreme Court of the State of New York and removed thence to the Circuit Court of the United States. A motion to remand was denied; a motion that complainant re-plead was granted and complainant did re-plead, but has failed to strictly comply with the order in the respect named. However, a failure to comply with that order in such respect is not ground for demurrer. The question is, does the amended bill of complaint state facts which in the Circuit Court of the United States entitle complainant to any relief in equity, or which entitle him to maintain an action in equity against these defendants? The complainant contends that in the Supreme Court of the State of New York, where this action was originally commenced, it is unnecessary to allege or prove, in order to maintain an action on this state of facts, that complainant owned his shares at the time of the transactions of which he complains, or that they thereafter devolved upon him by operation of law;—in other words to show that he was then interested in the corporation, or that the title to shares of one who then was interested therein has devolved upon him by operation of law. He insists that as he had a cause of action in equity in the Courts of the State of New York when and where he brought his action he has the same equitable cause of action in the Circuit Court of the United States and that it may here be made out and sustained upon the same allegations and proof as are sufficient there. In short he contends that equity rule 94 above quoted has no application to a suit in equity removed to this Court from a State Court. The following cases are cited to sustain the contention: Earle *vs.* Seattle R. Co., 56 Fed. 909; Evans *vs.* Union Pac. R. R. Co., 58 Fed. Rep., 497; Maeder *vs.* Buffalo Bill's Wild West Co., 132 Fed., 280; Frothingham *vs.* Broadway &c., R. R. Co.,
55 9 Civ. Proc. 304, 314; Hanna *vs.* Lyon, 179 N. Y., 107.

It seems that in New York State its courts give equitable relief to a plaintiff, shareholder, who sues in behalf of himself and all others similarly situated to enforce a cause of action like this which the corporation itself might enforce for its own benefit, and con-

sequently for the benefit of its shareholders, but will not, even if such plaintiff had no interest in the corporation or in the enforcement of the cause of action at the time the wrong complained of was committed and his present interest has not devolved upon him by operation of law since. Young *vs.* Drake, 8 Hun. 61-64; Frothingham *vs.* Broadway &c., R. R. Co., 9 Civ. Proc., 304, 314; O'Connor *vs.* Virginia P. & P. Co., 46 Miss., 530, 535; Fritchett *vs.* Murphy, 46 App. Div., 180, 186; Sayles *vs.* Central National Bank of Rome, 18 Misc., 155, 158; Hanna *vs.* Lyon, 179 N. Y. p. 107.

It must be regarded as settled law in the Courts of the United States that a shareholder or stockholder in a corporation cannot maintain an action in equity of the description pointed out in equity Rule 94, before quoted unless he was a shareholder at the time of the transactions of which he complains or his shares or share have since devolved upon him by operation of law. To give the courts of the United States equitable jurisdiction, the right to give equitable relief, this fact must be pleaded and proved. If the fact does not exist then the Courts of the United States have no equitable jurisdiction of the case. That is, they will not exercise their general equitable powers and jurisdiction. Unless that fact appears it is not a case cognizable in equity in the Courts of the United States whatever may be the rule of equity or of equity jurisdiction in the several states, or in any one of them.

Hawes *vs.* Oakland, 104 U. S., 450, 461. Dimpfell *et al.*
56 *vs.* Ohio & Miss., R. R. C., 110 U. S., 209, 210, 211; Corbus *v.* Gold Min. Co., 187 U. S., 455, 462; Quincy *vs.* Steel, 120 U. S., 241, 245, 246; Davis & F. M. Co. *vs.* Los Angeles, 189 U. S. 207, 220; Greenwood *vs.* Freight Co. 105 U. S., 16; Detroit *vs.* Dean, 106 U. S., 537, 542; Porter *vs.* Sabin, 149 U. S. p. 478.

There is another line of cases in the Supreme Court of the United States holding that where service of process in an action brought in the court of a state against a corporation of another state is made upon an officer of such corporation temporarily in such state on his own private business, the corporation having no office or agent or property in the state where such service is made and doing no business there, the *court state* obtains no jurisdiction of such corportion even though the statutes of the state and its highest court pronounce and hold such service good and sufficient, and in such cases after removal to the Federal Court, the actions must be dismissed.

Goldey *vs.* Morning News, 156 U. S., 518; D'Arcy *vs.* Ketchum, 11 How., 165; Hall *vs.* Lanning, 91 U. S. 160; York *v.* Texas, 137 U. S. 15; Wilson *v.* Seligmann, 144 U. S. 41; Lafayette I. Co. *vs.* French, 18 How., 404; St. Clair *v.* Cox, 106 U. S. 350, 357, 359; Fitzgerald *vs.* Fitzgerald, 137 U. S., 98;-106; Mexican C. R. Co. *vs.* Pinkey, 149 U. S., 194; *In re* Hohorst, 150 U. S., 653-663; There are many other cases to the same effect.

In Goldey *vs.* Morning News, *supra,* at page 523, the opinion of the Court says:

The jurisdiction of the Circuit Courts of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States and cannot

be enlarged or abridged by any statute of a state. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal. Gordon *vs.* Longest, 16 Pet. 97; Insurance Co. *v.* Morse, 20 Wall. 445; Barron *vs.* Burnside, 121 U. S.,
57 186; Sou. Pac. *vs.* Denton, 146 U. S. 202; 207, 209. As was said by this Court in Gordon *vs.* Longest, "One great object in the establishment of the courts of the United States and regulating their jurisdiction, was to have a tribunal in each State presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress." 16 Pet. 104.

Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself in the Circuit Court of the United States of any and every defense, duly and seasonably reserved and pleaded, to the action 'in the same manner as if it had been originally commenced in the said circuit court.'"

These cases go to the jurisdiction of the Circuit Court of the United States over the person of the defendant and hold that such service as has been mentioned confers no such jurisdiction even though the statutes and decisions of the highest courts of the state say it does. In New York for instance, such service is held good. Hiller *vs.* B. & M. R. Co. 70 N. Y. 223; Pope *vs.* Terre Haute Co., 87 N. Y. 137.

By Sec. 1, Chap. 137, Act of March 3, 1875, 18 St. 470, original jurisdiction was conferred on the Circuit Court of the United States in controversies between citizens of different states when the matter in dispute exceeded $500, but limited the jurisdiction of such Circuit Courts as follows:

"Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes, nogotiable by law merchant, and bills of exchange."

Sec. 2 of the same act authorized the removal of causes between citizens of different states involving that amount from the State Court to the Circuit Court but did not impose the above restrictions as to assignees or assignments.

It has been twice held by the Supreme Court of the United States that the limitation on the jurisdiction of the Circuit Court
58 imposed by the first section has no application to suits commenced in the State Courts and removed to the United States Circuit Court, and such suits could be removed and maintained provided the laws of the state from the courts of which the removal took place recognized and sustained the cause of action. Delaware County Com'rs *vs.* Diebold, 133 U. S. 473; Claflin *et al vs.* Commonwealth Ins. Co., 110 U. S. 81. See also language of Mr. Justice Clifford in

City of Lexington *vs.* Butler 14 Wall., 282, and Bushnell *vs.* Kennedy 9 Wall., 387. These cases would seem to hold that notwithstanding an express special limitation on the jurisdiction of the Circuit Court as to actions commenced therein such limitation has no application to a suit commenced in a State Court and removed to the Circuit Court, there being of course, the necessary diversity of citizenship and amount in controversy to bring the case within the general jurisdiction of the Circuit Court. But this limitation on the right of a plaintiff to bring his suit in the Circuit Court is not necessarily a declaration that he has no cause of action, legal or equitable. In the first instance it denies to that Court the right to exercise jurisdiction of the case. It excepts out of the general jurisdiction conferred of a certain class of cases special cases otherwise within it. On the other hand Equity Rule 94 and the cases cited seem to hold that a shareholder in a corporation has no cause of action in equity in a case like this, anywhere, unless he held his shares at the time of the transactions complained of or they have devolved upon him by operation of law since. Jurisdiction of parties and of the subject matter in controversy and to determine whether a cause of action exists, is one thing, but equitable jurisdiction is quite another. Thus the Circuit Court has jurisdiction of a controversy between parties residing in different states if the
59 amount involved, exclusive of interest and costs, exceeds $2,000. The jurisdiction to hear and det-rmine this controversy is expressly conferred. So jurisdiction to hear and determine actions of ejectment may be expressly conferred upon the Supreme Court of a State and not on its county courts. In such cases the county court has no jurisdiction of such a case. Equitable jurisdiction resides in the Circuit Court as a general proposition and a general power, but whether or not in a given case that Court "has equitable jurisdiction" depends upon whether or not on general equitable principles, as established by the courts, the action in equity will lie. If not there is no "equitable jurisdiction" of the case. Certain facts must exist or there is no equitable jurisdiction of the particular case while there is general equitable jurisdiction and power in the Court. Anderson *v.* Carr, 65 Hun., 179; 19 N. Y. Supp. 992, 993; People *vs.* McKane, 78 Hun., 154, 28 N. Y. Supp. 981, 985. Hunt *vs.* Hunt, 72 N. Y. 217; People *vs.* Sturdevant, 9 N. Y., 263; 1 Pomeroy's Eq. Juris. (3rd Ed.) Secs. 129, 130, 131. Says Pomeroy:

" 'It is important to obtain at the outset a clear and accurate notion of what is meant by the term "Equity Jurisdiction." It is used in contradistinction to "jurisdiction" in general, and to "common law jurisdiction" in particular. In its most general sense the term "jurisdiction" when applied to a court, is the power residing in such court to determine judicially a given action, controversy or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity; if it does exist, the determination, however erroneous in fact or in law, is binding upon the parties until re-

versed or set aside in some proceeding authorized by the practice, and brought for that express purpose. * * * "Equity jurisdiction" therefore, in its ordinary acceptation, as distinguished on the one side from the general power to decide matters at all, and on the other from the jurisdiction "at law" or "common law jurisdiction" is the power to hear certain kinds and classes of civil causes according to the principles of the method and procedure adopted by the court of chancery, and to decide them in accordance with the doctrines and rules of equity jurisprudence, which decisions may involve either the determination of the equitable rights, estates and interests of the parties to such causes, or the granting of
60 equitable remedies. In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary, right, estate or interest to be maintained, or the violation of which furnishes the cause of action must be equitable rather than legal; or the remedy granted must be in its nature purely equitable; or if it be a remedy which may also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure. At the same time if a court clothed with the equity jurisdiction as thus described should hear and decide according to equitable methods, a case which did not fall within the scope of the equity jurisprudence, because both the primary right invaded constituting the cause of action and the remedy granted were wholly legal, and belonging properly to the domain of the law courts, such judgment, how-ver erroneous it might be and liable to reversal, would not necessarily be null and void. * * * It is plain, from the foregoing definitions, that the question whether a given case falls within the equity jurisdiction is entirely different and should be most carefully distinguished from the question whether such case is one in which the relief peculiar to that jurisdiction should be granted, or in which the equity powers of the court should be exercised in maintaining the primary right, estate or interest of the plaintiff. The constant tendency to confound these two subjects so essentially different has been productive of much confusion in the discussion of equitable doctrines. Equity jurisdiction is distinct from equity jurisprudence. One example will suffice to illustrate this important proposition. A suit to enforce the specific performance of a contract, must always belong to the equity jurisdiction, and to it alone, since these remedies are wholly beyond the scope of common law methods and courts; but whether the relief of a specific performance, or of a reformation, shall be granted in any given case, must be determined by an application of the doctrine of equity jurisprudence to the special facts and circumstances of that case.

And in People *vs.* McKane, *supra* the Court held:

"Jurisdiction, in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power to hear and determine a cause. It is the power lawfully conferred to deal with the general subject involved in the action; it does not depend upon

the ultimate existence of a good cause of action in the plaintiff in the particular case before the court, and does not relate to the rights of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced nor the right of the plaintiff to avail himself of it if it exists. It precedes those questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity, either in the plaintiff or in any one else. Jurisdiction is entirely independent of the manner of its exercise, involving the power to decide either way upon the facts presented to the court.

The term 'jurisdiction' as generally used in equity jurisprudence, imports not the power to hear and decide, but the cases and occasions when that power will be exercised, and is to be distinguished from the use of that term in its strict meaning."

If A sues B for assault and battery and asks equitable
61 relief that B be restrained from committing further assaults, no cause of action in equity is stated, or there is no "equitable jurisdiction" of the case for the reason that the courts of equity do not grant such relief or any relief in such cases. But if A sues B for cutting down his orchard trees on his farm and asks an injunction the court of equity will grant the relief, if B is doing the acts alleged, as here the case is within the equitable jurisdiction of the court. That is in this class of cases courts of equity on well established equitable principles grant such relief. In both cases the court has jurisdiction but not equitable jurisdiction. In the first case it dismissed the cause for the reason the facts stated do not bring the case within the "equitable jurisdiction" of the court; that is, they do not make out a case where the court gives relief. In the class of cases of which this is one the Supreme Court of the United States has held, in the cases cited, that equitable jurisdiction will not be exercised, equitable relief will not be granted unless the complainant avers and proves that he was a shareholder in the corporation at the time of the transactions complained of or that his shares have devolved upon him since by operation of law. That court has plainly and repeatedly said that if such fact does not appear no cause of action within the equitable jurisdiction of the United States Court is stated. This being so, it seems to me immaterial how the case comes into this court. Congress has provided that "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States,
or treaties made, or which shall be made under their au-
62 thority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in *in* dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." Act of March 1875, Rev. Stat. Sec. 629; clause 1 as amended March 3, 1887; and corrected Aug. 13, 1888, 25 U. S. Stats. 433.

The jurisdiction conferred in equity exists independently of state laws, and is similar to the equity jurisdiction of England. Allen *v.* Blunt, 1 Blatchford, 480; Fed. Cas. No. 215. While the Supreme Court of the United States may and must, when occasion demands, decide what civil cases are "at law" and what are "in equity" and in what cases equitable relief will be given, what cases are within the equitable jurisdiction and power of the court, it may not by rule or otherwise limit the jurisdiction of the Circuit Courts of the United States conferred by the Acts of Congress and say that a party litigant residing in one state may not bring his equitable action, if he has one, against a resident of another state in the proper Circuit Court and have it there decided. It may however, as stated, say what cases are within the equitable jurisdiction of the Court; in what cases and upon what state of facts that Court may grant equitable relief. This is what the Supreme Court has done in this class of cases, and it seems to me clear, that Court has decided repeatedly, that a complainant suing as a shareholder or stockholder has no cause of action in equity, in behalf of himself and others similarly situated against a corporation and others, founded on rights which may properly be asserted by the corporation itself, if it would, unless he was such shareholder or stockholder in the corporation at the time of the transactions of which he complains, or such shares have devolved upon him since by operation of law.

63 This was decided by the Supreme Court before it promulgated Rule 94. The rule was to emphasize the decision.

The Courts of the United States administer equity in acordance with the principles of equity jurisprudence as laid down and declared by the Supreme Court of the United States and not as laid down and declared by the courts of the several states, and if a citizen and a corporation of the state of Minnesota have committed some act or acts of which complaint is made (not against some statute of a state) and a citizen of some other state brings suit in equity asking equitable relief, and the case is one of which the acts of Congress referred to give the Circuit Court of the United States jurisdiction, it seems to me very clear that the rights of the parties must be determined according to the rules and principles of equity jurisprudence as determined and administered in the Courts of the United States.

It is not a question of enforcing the provisions of some statute of a state conferring or defining some right, but one involving the application of the principles of the common law and of equity jurisprudence which are general throughout the United States and in applying which the courts of the United States are not bound or governed by the decisions of the state courts, but by the decisions of the Supreme Court of the United States. See 2 Foster Fed. Pract. (3rd Ed.) pp. 876-877; 49 Fed. p. 4, per Wheeler J. In Burgess *vs.* Seligman, 107 U. S., 20-33, the court said:

"The Federal Courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the

results would be anomalous and inconvenient but for the exer-
64 cise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence."

In Manhattan Life Ins. Co. *vs.* Broughton, 109 U. S. at page 126, the court said:

"The question involved was not a question of local law, but of general jurisprudence, upon which Mrs. Ferguson, and Broughton as her trustee, had a right to seek the independent judgment of a federal court. Railroad Co. *vs.* Lockwood, 17 Wall. 357, 368; Myrick *vs.* Mich. Cent. R. R. 107 U. S., 102; Burgess *vs.* Seligman, 107 U. S. 20."

It seems to me clear that the question here is one of general equity jurisprudence where the courts of the United States are to be governed by their own independent judgment and where the Circuit Court should follow the decisions of the Supreme Court of the United States as to what the law is.

In Myrick *vs.* Mich. Cent. R. R. Co., 107 U. S. at page 109, the court said in relation to a contract of carriage and in referring to the decisions of the Supreme Court of the State of Illinois:

"Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of the State Court must control. It is a matter of general law, upon which this court will exercise its own judgment. Chicago City *vs.* Robbins, 2 Black, 418; R. R. Co. *v.* National Bank, 102 U. S., 14; Hough *vs.* R. R. Co., 100 id. 213."

It seems to me it would be a strange medley in the law, as administered by the courts of the United States, to hold in this class of cases, in administering equity, where no local law, or state statute, or state constitution is involved, that a citizen of New York has a cause of action in equity against a Minnesota corporation and a citi-
65 zen of that state cognizable and enforceable by the Circuit Court of the United States sitting in New York, if he commences his action in the State Court and it is removed to the United States Circuit Court, but that another citizen of the State of New York, on the same facts and equities, has no cause of action in equity cognizable and enforceable by the United States Circuit Court sitting in New York if such action is brought in that court in the first instance. This would make his right of action and right to relief depend, not on the facts of the case, but on the court in which he

commenced his action. I do not think that is the law. Where a line of uniform decisions has been established by the highest court of a state so they have become a local rule of property and parties are presumed to contract with reference thereto the courts of the United States should and, except in special cases for special reasons, do follow them. Neves *v.* Scott, 13 How., 268; 271. Gaines *v.* Fuentes, 92 U. S., 10, 20; Ellis *vs.* Davis, 109 U. S., 485. But that is not the case. In 2 Foster Fed. Pr., (3rd Ed.) pp. 876-877, it is said:

"The Revised Statutes provide that 'the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' This rule applies to condemnation proceedings and to all civil proceedings in the Federal Courts, except equity and admiralty cases, although they are not strictly according to the common law."

In N. Y., N. H. & H. R. Co. *vs.* Cockroft, 49 Fed. Rep. 3-4, Judge Wheeler said:

"By section 721 of the Revised Statutes of the United States the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. This seems to govern all proceedings in court, except equity and admiralty cases, although they are not strictly accordingto the common law, and to be applicable here."

And I wish to emphasize two facts: first, I am not pointed to any decision of the Court of Appeals of the State of New York
66 holding a doctrine contrary to that laid down in Hawes *vs.* Oakland *supra*, and second, in Hawes *vs.* Oakland the Supreme Court first decided the case and enunciated the equitable doctrine and rules applicable to such a case and then immediately adopted and promulgated the Rule in Equity quoted to emphasize that decision. See Corbus *vs.* Gold Min. Co., 187 U. S., 462. I think the rules laid down in that case are not local in their application, but general; that they constitute a general rule of equitable jurisprudence and equitable jurisdiction throughout the entire United States and govern all like cases tried in the Circuit Court of the United States whether instituted there or removed thereto from a state court. In giving equitable relief in such cases the holdings of the Circuit Courts of the United States should be uniform and all shareholders in corporations should stand on an equality therein. Many state courts, as those of New York, hold that a plaintiff in a negligence action must allege and prove absence of contributory negligence. In the United States Circuit court contributory negligence is an affirmative defense and must be alleged and proved. This is the rule where the case is removed from the state court to the circuit court. R. R. Co. *vs.* Gladwood, 15 Wall.,

401; I. & St. L. R. Co. *vs.* Horst, 93 U. S., 291; N. Pac. R. Co. *vs.* Mares, 123 U. S., 710.

The demurrer must be sustained, but complainant may file and serve an amended bill of complaint within thirty days after being served with a copy of the order to be entered pursuant hereto.

(Endorsed:) United States Circuit Court, Southern District of New York.—Clarence H. Venner *vs.* Great Northern Railway Company and James J. Hill.—Opinion, Geo. W. Ray, U. S. Judge.—U. S. Circuit Court, Southern District N. Y., Filed May 16, 1907, John A. Shields, Clerk.

67 United States Circuit Court, Southern District of New York.

No. 7033. In Equity.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Defendants.

This cause having been set down for hearing on the demurrers of the defendants, Great Northern Railway Company and James J. Hill, to the amended bill of complaint, and the same having come on to be heard at a stated term of this Court, held on the 30th day of April, 1907, after hearing John A. Garver, Esq., of counsel for defendant Great Northern Railway Company, in support of the demurrer of said defendant, and Julius F. Workum, Esq., of counsel for defendant James J. Hill, in support of the demurrer of said defendant, and Abram J. Rose, Esq., of counsel for complainant, in opposition to said demurrers, and after due deliberation,

Now on motion of Shearman & Sterling, solicitors for defendant Great Northern Railway Company, and Simpson Thacher & Bartlett, solicitors for defendant James J. Hill, it is

Ordered, adjudged and decreed that said demurrers be and the same hereby are sustained, with costs and disbursements to each of the said defendants to be taxed by the Clerk, with leave to the complainant to amend his bill of complaint within thirty days after notice of entry hereof and payment of said costs and disbursements; and it is further

Ordered, adjudged and decreed that unless within said
68 time the complainant files and serves an amended bill of complaint and pays said costs and disbursements, final judgment shall be entered dismissing the complaint herein, with costs.

Enter- May 24, 1907.

GEO. W. RAY,
U. S. Judge.

(Endorsed:) United States Circuit Court, Southern District of New York.—Clarence H. Venner, Complainant, against Great

Northern Railway Company and James J. Hill, Defendants.—Order sustaining demurrer.—Simpson, Thacher & Bartlett, Solicitors for defendant, James J. Hill, 62 Cedar St. New York City.—Approved Shearman & Sterling, Att'y- for Def't Co.—U. S. Circuit Court, Southern District N. Y., Filed May 25, 1907, John A. Shields, Clerk.

68½ United States Circuit Court, Southern District of New York.

No. 7033. In Equity.

CLARENCE H. VENNER, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

This cause having been set down for hearing upon the demurrers of the defendants, Great Northern Railway Company and James J. Hill, to the amended bill of complaint, and the same having come on to be heard at a Stated Term of this Court, held on the 30th day of April, 1907, after hearing John A. Garver, Esq.. of counsel for the defendant, Great Northern Railway Company, in support of the demurrer of said defendant, and Julius F. Workum, Esq., of counsel for defendant, James J. Hill, in support of the demurrer of said defendant, and Abram J. Rose, Esq., of counsel for complainant in opposition to said demurrers,

Now, on motion of Shearman & Sterling, solicitors for defendant, Great Northern Railway Company, and Simpson, Thacher & Bartlett, solicitors for defendant, James J. Hill, it is

Adjudged and decreed that said demurrers be, and the same hereby are sustained, with twenty-one and 82/100 dollars ($21.82) costs and disbursements to defendant Great Northern Railway Company and sixty and 35/100 dollars ($60.35) costs and disbursements to defendant, James J. Hill, as taxed, with leave to the complainant to amend his bill of complaint within thirty days after notice of entry hereof, and payment of said costs and disbursements; and it is further

Adjudged and decreed that unless within said time complainant files and serves an amended bill of complaint, and pays said costs and disbursements, final judgment shall be entered, dismissing the complaint herein, with costs.

Judgment signed this 6th day of June, 1907.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States Circuit Court, Southern District of N. Y.—Clarence H. Venner *vs.* Great Northern Railway Co. and James J. Hill.—Judgment.—Simpson, Thacher & Bartlett, Attorneys for James J. Hill, 62 Cedar St. New York City.—U. S. Circuit Court, Southern District N. Y., Filed Jun. 6, 1907, John A. Shields, Clerk.

69 United States Circuit Court, Southern District of New York.

No. 7033. In Equity.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

This cause having been set down for hearing upon the demurrers of the defendants, Great Northern Railway Company and James J. Hill, to the amended bill of complaint, and the same having come on to be heard at a Stated Term of this Court, held on the 30th day of April, 1907, after hearing John A. Garver, Esq., of counsel for the defendant, Great Northern Railway Company, in support of the demurrer of said defendant, and Julius F. Workum, Esq., of counsel for defendant, James J. Hill, in support of the demurrer of said defendant, and Abram J. Rose, Esq. of counsel for complainant, in opposition to said demurrers, and an interlocutory judgment sustaining said demurrers, with costs and disbursements, with leave to complainant to amend the bill of complaint within thirty days after notice of entry of said interlocutory judgment and payment of said costs and disbursements, and directing that unless within said time complainant file and serve an amended bill of complaint and pay said costs and disbursements, final judgment be entered dismissing the complaint herein with costs, having been entered and filed on the 6th day of June, 1907, and it ap-
70 pearing from the admission of service by the solicitor for the complainant of said interlocutory judgment, with notice of entry thereon, on the 6th day of June, 1907, and by the affidavits of Millard C. Humstone, verified the 9th day of July 1907, and of William D. Hart, verified the 8th day of July 1907, that the time fixed by the said interlocutory judgment for service of an amended bill of complaint and payment of costs and disbursements has expired, and that no amended bill of complaint has been served, and that the costs and disbursements have not been paid; and the costs and disbursements for the defendant the Great Northern Railway Company having been duly adjusted at Twenty-one and 82/100 dollars ($21.82), and the costs of the defendant, James J. Hill, having been duly adjusted at Sixty and 35/100 dollars ($60.35),

Now, on motion of Shearmen & Sterling, Solicitors for the defendant Great Northern Railway Company, and Simpson, Thacher & Bartlett, solicitors for defendant, James J. Hill, it is

Ordered, adjudged and decreed that the complaint in this action be and the same hereby is dismissed, and that the defendant, The Great Northern Railway Company, recover of the plaintiff the sum of Twenty-one and 82/100 dollars ($21.82), costs and disbursements, and the defendant, James J. Hill, recover of the complainant

the sum of Sixty and 35/100 dollars ($60.35) costs and disbursements.

Enter
July 17, 1907.

GEO. W. RAY,
U. S. Judge.

71 (Endorsed:) United States Circuit Court. Southern District of New York.—Clarence H. Venner, Complainant, *vs.* Great Northern Railway Company and James J. Hill, Defendants. —Final judgment.—Simpson, Thacher & Bartlett, Attorneys for Defendant, James J. Hill, 62 Cedar Street, New York City.—U. S. Circuit Court, Southern District N. Y. Filed Jul- 18 1907. John A. Shields, Clerk.

72 In the Circuit Court of the United States for the Southern District of New York. In Equity.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

Certificate of Question of Jurisdiction upon Appeal from the Circuit Court of the United States for the Southern District of New York, Second Circuit, to the Supreme Court of the United States.

This cause coming on for hearing upon the application of the complainant Clarence H. Venner, to remand the said cause to the Supreme Court of the State of New York on the ground that the diverse citizenship necessary to confer jurisdiction on this Court did not exist, and that there was no jurisdiction in this Court to consider the same, and said application having been duly submitted to and fully considered by this Court and said application to remand having been denied and an order denying the same having been duly entered by this Court for the reason and upon the ground that the Court had jurisdiction of the said cause upon the facts alleged in the complainant's amended bill of complaint, and the said cause coming on for further hearing upon the demurrer of the defendants Great Northern Railway Company and James J. Hill, to the complainant's amended bill of complaint on the
73 grounds that said complainant has not in said amended bill made or stated any such acts as ought to entitle him to any relief in equity, or to any relief as is thereby sought and prayed for, from or against the defendants, and that upon the face of said bill nothing therein states facts sufficient to constitute a cause of action against said defendants, and said amended bill of complaint and the demurrers thereto having been duly submitted to and fully considered by this Court and said demurrers having been sustained with leave to the complainant to further amend the bill of complaint within thirty days after notice of entry of Interlocutory

Judgment sustaining the said demurrers, and upon payment of costs and disbursements, and said interlocutory judgment directing that unless within said time complainant file and serve an amended bill of complaint and pay said costs and disbursements, final judgment be entered dismissing the complaint herein with costs, and no amended bill of complaint having been served as permitted by said Interlocutory Judgment, and said costs and disbursements not having been paid and final judgment having been entered dismissing the said complaint in this action and directing that the defendant the Great Northern Railway Company recover of the complainant the sum of $21.82 costs and disbursements, and that the defendant James J. Hill recover of complainant the sum of $60.35 costs and disbursements.

And the said complainant being desirous of taking an appeal from the decree of this Court denying the said application to remand to the State Court and dismissing this cause as aforesaid on
74 the demurrer to the complaint filed by the defendants, and having this day applied to this Court for a certificate as required in such cases,

Now, therefore, the Court hereby certifies to the Supreme Court of the United States the question of jurisdiction which has arisen upon the aforesaid motion to remand and the demurrers to the complaint, to wit: whether or not the complainant's amended bill of complaint showed that there was such diversity of citizenship between the party complainant and parties defendant in this cause as would be sufficient under the provisions of the United States Revised Statutes to confer jurisdiction upon the United States Circuit Court for the Southern District of New York, of this cause, and whether this cause, as brought in the Supreme Court of the State of New York was one over which this Court would have had original jurisdiction, and was therefore removable into this Court.

And this Court hereby certifies that the allegations of the complainant's amended bill of complaint are as follows:

Clarence H. Venner being a citizen of the State of New York, and residing in the Borough of Manhattan, in the City, County and State of New York, suing for himself and for the benefit of the Great Northern Railway Company and all other stockholders of said corporation defendant, who are similarly situated, brings this his bill against Great Northern Railway Company, a corporation organized by and existing under the Laws of the State of Min-
75 nesota, and having its principal office in the City of St. Paul in the State of Minnesota and James J. Hill, who is a citizen of said State of Minnesota and a resident of said City of St. Paul, in said State of Minnesota, and thereupon your orator complains and says:

First. That the amount in controversy herein exceeds the sum of Two thousand dollars ($2,000) exclusive of interest and costs.

Second. That the Chicago, Burlington & Quincy Railroad Company, which is hereinafter referred to, now is, and at all of the times hereinafter stated was, a corporation organized by, and existing under the laws of the State of Illinois, and on or about the first

day of April, 1901, had a capital stock issued and outstanding of about $110,000,000.

Third. That the Northern Pacific Railway Company, which is hereinafter referred to, now is, and at all of the times hereinafter stated was, a corporation organized by and existing under the laws of the State of Wisconsin.

Fourth. That your orator now is, and on and before the date of the demand which is hereinafter referred to, was the lawful owner and holder of three hundred (300) shares of the preferred capital stock of the defendant Great Northern Railway Company, being of the par value of One hundred dollars ($100) per share, and of the present market value of about One hundred thousand dollars ($100,000), and that the said shares of stock then stood,
76 and now stand in the name of your orator upon the stock books of said Great Northern Railway Company.

And further complaining your orator alleges upon information and belief:

Fifth. That at all of the times hereinafter stated, the defendant James J. Hill was a Director and President of the defendant, Great Northern Railway Company, and dominated and controlled the said corporation defendant, and the Board of Directors thereof; and that at all of said times a great majority of the Board of Directors of said corporation defendant were employés of said corporation defendant, and were subservient to the wishes of the defendant James J. Hill, in the exercise of their official powers as directors and employés of the said corporation defendant.

Sixth. That on or about November 1, 1900, or shortly thereafter, the defendant James J. Hill, then acting as a Director and President of, and controlling and dominating the Board of Directors of the defendant Great Northern Railway Company as aforesaid, together with other persons to this plaintiff unknown, conceived and undertook to carry out and put into effect a plan and design whereby the defendant Great Northern Railway Company and the Northern Pacific Railway Company should jointly acquire a large and controlling interest in the capital stock of said Chicago, Burlington & Quincy Railroad Company. That in connection with the plan and design so conceived, the defendant James J. Hill, in violation of his duty as such officer and director honestly, diligently and
77 carefully to administer the affairs of the defendant, Great Northern Railway Company, and with knowledge of the plan and design above stated, conceived and undertook to carry out and put into effect, a wrongful and illegal plan and design to make a large profit for himself personally, at the expense and to the loss and damage of the said defendant corporation, by personally purchasing, or by causing to be purchased and held for him, and subject to his control, a large amount of the capital stock of the Chicago, Burlington & Quincy Railroad Company, at the prices then prevailing, to wit: at from about $135. per share to about $185. per share, and by thereafter causing the same to be purchased or acquired by the defendant, Great Northern Railway Company, and the

said Northern Pacific Railway Company, at the price of Two hundred dollars ($200) per share, under the offer which is hereinafter more particularly set forth, and which he then, at the time of said purchase of such stock, intended to cause to be made by the above named defendant Great Northern Railway Company and said Northern Pacific Railway Company in further ance of the said wrongful and illegal scheme and design.

Seventh. That thereafter, and between about the first day of November, 1900, and the 20th day of April, 1901, the defendant James J. Hill, as a part of, and in furtherance of the wrongful scheme and design above set forth, and while acting as President and Director as aforesaid, at divers times and from divers persons, personally purchased or acquired, or caused to be purchased or acquired for him, and to be held in his interest and subject to his control, a large amount of the capital stock of said Chicago, Burlington &
78 Quincy Railroad Company. That your orator is unable to state just what amount of the said capital stock was so purchased and acquired by or for the said James J. Hill, or the exact prices at which the same was so purchased or acquired, but he alleges upon information and belief, that the par value of the said capital stock which was so purchased or acquired by or for him, or held subject to his disposition and control, exceeded in the aggregate, the sum of Twenty-five Million dollars ($25,000,000) and that the same was so purchased or acquired with the preconceived and premeditated purpose and intent on the part of said James J. Hill that he would procure and cause the same, or a large interest therein, to be bought by, and transferred to said Great Northern Railway Company at greatly advanced and increased prices, and in the manner which is hereinafter set forth.

Eighth. That thereafter, and on or about the latter part of the month of April, 1901, the defendant James J. Hill while acting as President and Director as aforesaid, and while dominating and controlling the Board of Directors of said Great Northern Railway Company, and as a part of, and in furtherance of the wrongful scheme and design which is above set forth, and in violation of his duty as a Director and as President as aforesaid, did cause and procure said Great Northern Railway Company to join and coöperate with said Northern Pacific Railway Company in making a joint offer to the stockholders of the Chicago, Burlington & Quincy Railroad Company, through the President and Directors of said
79 last named Company, to purchase at the price of Two hundred dollars ($200) per share, all or any part of the capital stock, not less than two-thirds, of said Chicago, Burlington & Quincy Railroad Company, as is above set forth, the said consideration and purchase price for said shares of the capital stock to be paid by the issuance and delivery to the holders of such stock, of the collateral trust bonds to be made and issued jointly by the Great Northern Railway Company and the Northern Pacific Railway Company at par; that is to say, by the issuance and delivery of one of said bonds of the par value of one thousand dollars ($1,000) for

each five shares of said capital stock; with an option to the stockholders to accept for each share of stock $160 in bonds and $40 in cash, or, to a limited extent, $200 in cash for each share, the total amount payable in cash under such options being limited to $50,000,000. That said offer was by said James J. Hill so caused and procured to be made, with the preconceived intent and purpose that he might be enabled to make large, wrongful and illegal personal profit and gain out of said transaction.

Ninth. That thereafter, and on or about the first day of July, 1901, the said James J. Hill, while acting as Director and President as aforesaid, and exercising a dominating influence over the defendant Great Northern Railway Company and its Directors, and as a part of and in furtherance of the said wrongful scheme and design as above set forth, did sell and transfer, or cause to be sold and transferred to said Great Northern Railway Company and said
80 Northern Pacific Railway Company jointly, and did cause and procure said corporation defendant and said Northern Pacific Railway Company to purchase upon the terms, at the price and for the consideration last above set forth, a large amount of the shares of the capital stock of said Chicago, Burlington & Quincy Railroad Company, including the stock which had theretofore been purchased or acquired by, or for said James J. Hill, and which was then held and owned by him, or held for him or under his control; and that said James J. Hill while acting as Director and President as aforesaid, did make and acquire a very great, wrongful and illegal personal profit and gain out of said transaction, to the injury of said Great Northern Railway Company and its stockholders. That the said Great Northern Railway Company then acquired and now retains and possesses an undivided one-half interest in all of the said shares of stock of the Chicago, Burlington & Quincy Railroad Company which has been jointly purchased by said Great Northern Railway Company and said Northern Pacific Railway Company, as aforesaid, to wit: 1,075,772 shares, of the aggregate par value of $107,577,200. Said joint collateral trust bonds were issued and used by said Companies in acquiring capital stock of said Chicago, Burlington & Quincy Railroad Company, and were then, and are now worth and selling on the market at about par. That your orator is unable to state the exact amount of the interest or share of said Great Northern Railway Company in the said Capital Stock of said Chicago, Burlington & Quincy Company which was so sold and transferred by or for said James J. Hill to said Great Northern Rail-
way Company and said Northern Pacific Railway Company
81 jointly, or the exact amount of the wrongful and illegal gain and profit which was realized by said James J. Hill by and out of said transaction, but your orator alleges upon information and belief, that the par value of the interest or share of said Great Northern Railroad Company in the said shares of the capital stock which were so sold and assigned as aforesaid, and which said Hill owned or controlled at the time of said sale, exceeded in the aggregate the sum of Twenty-five million dollars ($25,000,000) and that the said wrongful and illegal gain and profit which was so realized by said

James J. Hill by and out of the said transaction amounted in the aggregate to more than ten million dollars ($10,000,000).

Tenth. That on or about the 7th day of March, 1906, and before the commencement of this action, your orator made a demand in writing upon the defendant Great Northern Railway Company *Company,* its Directors and the defendant James J. Hill as its President, that this or a like action be instituted by the said corporation defendant against said James J. Hill, the other defendant herein, for the relief which is prayed for in this complaint, and that the said corporation defendant and its Board of Directors and the defendant James J. Hill, as its President, have all of them refused to comply with the said demand, and have refused and failed to commence, or cause to be commenced, any action whatever in compliance with such demand.

Eleventh. All which actings, doings and dealings of the said defendant James J. Hill are contrary to equity and good con-
82 science and tend to the manifest damage, wrong, injury and oppression of your orator, and the defendant Great Northern Railway Company and its stockholders in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have adequate relief only in a Court of equity, where matters of this nature are properly cognizable and relievable, your orator brings this bill against the said defendants.

Twelfth. To the end therefore, that the said defendant James J. Hill, may, if he can, show why this Court should not grant the relief which is hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer to make to such of the several interrogatories hereinafter numbered and set out, as by the note hereinafter written he is required to answer severally and respectively, that is to say:

1. Did you between November 1, 1900 and July 1901, buy or own, or cause to be bought or held for your account and order, or have any interest in, any of the shares of the capital stock of the Chicago, Burlington & Quincy Railroad Company?

If you answer in the affirmative, state when, how many shares and at what prices they were bought.

2. Did you belong to, or were you interested in, any firm, syndicate or corporation which, between November 1, 1900 and July 1901, bought, acquired or held any shares of such stock?

If so, state how many shares did they or it buy, when and at what prices, and what was your interest in such syndicate or combination, or either of them?

83 3. Was any such stock which had been bought by you or for your account, or by any such syndicate, firm or corporation in which you were interested, afterwards sold, transferred or delivered by you, or by such firm, syndicate or corporation, to the Great Northern Railway Company or the Northern Pacific Railway Company, or to both of said Companies jointly, or to any trustee for said Companies or for either of them?

4. If you answer interrogatory number 3 in the affirmative, state how many shares were so sold or transferred, when and to whom the same were sold or transferred at what prices, and in what form payment therefor was made.

5. Do you now own, or have you ever owned, any of the joint collateral trust bonds of the Great Northern Railway Company and the Northern Pacific Railway Company, or does any person, firm or corporation hold for your account any of such bonds?

6. If you answer interrogatory number 5 affirmatively, state (1) when were such bonds issued or delivered to you, or for your account, or to any syndicate, firm or corporation in which you were interested; (2) what amount in par value of such bonds were included in such deliveries, (3) were they, or any of them, a part of the issue of such bonds used in payment by said Companies for the stock of the said Chicago, Burlington & Quincy Railroad Company?

7. Do the Great Northern Railway Company and the Northern Pacific Railway Company now jointly own, or did they ever acquire any of the capital stock of the Chicago, Burlington & Quincy Railroad Company?

84 If you answer interrogatory number 7 affirmatively, state in detail; (1) when and how many of such shares of stock were so acquired, and what interest therein by the Great Northern Railway Company; (2) from what holders such shares were purchased and in what quantities; (3) were all such shares paid for with the joint collateral trust bonds of the Great Northern Railway Company and Northern Pacific Railway Company; (4) if any were paid for partly or wholly in cash, state the number of shares so purchased, from whom purchased, and what portion of such stock was paid for partly in cash at $40 per share and $160 in bonds, and what portion was paid for wholly in cash at $200 per share; (5) did such stock so bought with cash or bonds, embrace any shares thereof which were then owned, or which stood in your name, or were held for your account and order, or in which you were interested as part owner, either directly or as a member of any syndicate, and if so, to what extent for cash and to what extent for bonds?

9. If the delivery to the Great Northern Railway Company and the Northern Pacific Railway Company, or any trustees for said Companies, of the shares of stock of the Chicago, Burlington & Quincy Railroad Company, which were so acquired by the Great Northern Railway Company and the Northern Pacific Railway Company, and the delivery of the joint collateral trust bonds of the Great Northern Railway Company and the Northern Pacific Railway Company, or the delivery of any part of such stocks or bonds, was effected through or by any agent, firm, trust company or corporation, state the name and address of such agent, firm,

85 trust company or corporation, and state whether through that agency you received, or any one received for your account and order, any of the above described collateral trust bonds, and if so, how many thereof.

10. Were you at any time interested in, or a member of any syndicate formed for the purpose of underwriting any of the said joint

collateral trust bonds issued by the Great Northern Railway Company and Northern Pacific Railway Company.

11. If you answer in the affirmative, state the amount for which such syndicate was formed, the amount of your interest therein, the names of the other members of, or participants in said syndicate, the names of the managers of said syndicates, the amount of money paid by or for you on account of your interest in such syndicate, the amount of such bonds which were delivered to you, or for your account, or sold by any such syndicate for your account, or on account of your interest in such syndicate, the amount of commissions paid to the subscribers or participants in such syndicate, or the managers thereof for such underwriting, by each of the Great Northern and Northern Pacific Railway Companies, and the amount paid to, or realized by you or any one else for your account, for or as profits on your interest in such syndicate.

12. Did you at any time sell to such underwriting syndicate, or was there delivered to it for your account and benefit, or were you interested in any stock of the Chicago, Burlington & Quincy Railroad Company which was delivered or sold to such syndicate for cash, and if so, state the amount of such stock and the
86 prices paid for it, and the dates and amounts of said deliveries.

13. Are you now President of the Great Northern Railway Company? If you answer in the affirmative, state how long you have continuously been such President.

14. Are you now a member of the Board of Directors of said Great Northern Railway Company, and if so state how long you have continuously been such a Director, and whether you were such Director during the years 1900 and 1901.

15. State whether you are now a Director or officer of the Northern Pacific Railway Company, and if you answer in the affirmative, state how long you have continuously been such a Director or officer, and whether you were a Director or officer in the years 1900 and 1901.

16. State when you first conceived, or when was first proposed or suggested to you, the plan or scheme of having the Great Northern Railway Company and the Northern Pacific Railway Company acquire or purchase any part or all of the capital stock of the Chicago, Burlington & Quincy Railroad Company at $200 per share, payable in the joint collateral trust bonds above described.

17. State what was the aggregate par value of the shares of the capital stock of the Chicago, Burlington & Quincy Railroad Company which were actually sold and transferred to the Great Northern Railway Company and the Northern Pacific Railway Company, or to any trustee for said Companies, for and in consideration of the issuance and delivery of the joint collateral trust bonds of the said two last named Railway Com-
87 panies, and also state the amount of said stock paid for in cash and at what prices, and state what proportion of the shares of stock then so purchased was acquired by or delivered to, the Great Northern Railway Company as a result of said transaction.

18. State who were the Directors of the Great Northern Railway Company during the years 1900 and 1901, and what Directors held offices other than that of Director, in said Company, and what offices. Also state what Directors and officers of those years were related to you or connected with you by affinity.

19. Answer the last above interrogatory as to the year 1906.

20. Name the officers or directors of the Chicago, Burlington & Quincy Railroad Company with whom you had the negotiations which resulted in the offer by the Great Northern Railway Company and Northern Pacific Railway Company for the purchase of the capital stock of the Chicago, Burlington & Quincy Railroad Company set forth in the circular letter signed Francis W. Hunnewell, Chairman, dated April 29, 1901, if the said negotiations were conducted by you, and if they were not conducted by you state by whom they were conducted, and annex hereto a copy of the letter containing the offer made by the Great Northern Railway Company and the Northern Pacific Railway Company, and a copy of the said circular of April 29, 1901.

21. State the names of the persons other than yourself, who represented the Great Northern Railway Company and the North-
88 ern Pacific Railway Company at any and all times during the negotiations had with the directors or officers of the Chicago, Burlington & Quincy Railroad Company having reference to the purchase of the capital stock of the last named Company by the Great Northern Railway Company and the Northern Pacific Railway Company.

22. State when, where, and whether by correspondence or in person, the negotiations for the purchase of the Chicago, Burlington & Quincy Railroad Company stock by the Great Northern Railway Company and the Northern Pacific Railway Company were conducted.

23. If in answer to interrogatory number 22, you state that there was correspondence, annex hereto copies of such correspondence had between you and others, and all other correspondence on the subject, of which you may have, or can obtain copies.

25. State whether or not during the progress of the negotiations referred to in previous interrogatories, you in any manner represented to any of the directors or officers of the Chicago, Burlington & Quincy Railroad Company that you then owned, controlled or otherwise represented any interest in the capital stock of the Chicago, Burlington & Quincy Railroad Company, and if so, to whom.

25. If you answer interrogatory number 24 in the affirmative, state fully what interest in the stock of the Chicago, Burlington & Quincy Railroad Company you claimed to represent, either by ownership, control or otherwise, and in what manner and to what extent you claimed ownership, control or representation of such stock, and when you acquired it.

89 Thirteenth. That this action was originally instituted in the Supreme Court of the State of New York, and while it was so pending therein the defendants appeared therein by their respective solicitors, and afterwards on their joint petition, the ac-

tion was removed into this Court, and this bill is now filed in pursuance of the order of this Court, made and entered herein on the motion of the defendants, on the 25th day of October, 1906, and the parties being all before the Court, the issue and a service of subpœnas is unnecessary.

To the end therefore, that your orator and the defendant Great Northern Railway Company, and the other stockholders of said corporation may have that relief which they can obtain only in a court of equity, which may be just and proper under the circumstances of the case, your orator prays:

First. That the defendants may be required to answer this bill of complaint, but without oath, all answers under oath being expressly waived, except the answers of the defendant James J. Hill to the interrogatories which are propounded in the twelfth paragraph of this bill.

Second. That the defendants may be required to discover and produce the original documents and papers, to wit:

1. Circular letter dated April 29, 1901, addressed to the stockholders of the Chicago, Burlington & Quincy Railroad Company, signed Frances W. Hunnewell, Chairman.

90 2. A copy of the proposition of the Great Northern Railway Company and Northern Pacific Railway Company for the purchase of Chicago, Burlington & Quincy Railroad Company stock, referred to in the circular letter of April 29, 1901, above described.

3. Copy of the agreement between the Great Northern Railway Company and the Northern Pacific Railway Company and a syndicate of which J. P. Morgan & Company were managers, having reference to the sale of Fifty Million ($50,000,000) dollars of Great Northern Railway Company and Northern Pacific Railway Company joint collateral trust bonds.

Third. That the defendant James J. Hill may be ordered to account to the above named defendant Great Northern Railway Company, for his official conduct as a director and as President of the defendant Great Northern Railway Company, in respect to all of the matters which are in this complaint set forth, and to account for all gains and profits which have been realized by, or have accrued to him, said James J. Hill personally, out of, or as a result of the wrongful and illegal transactions or any of them, which are herein alleged and set forth.

Fourth. That the defendant James J. Hill may be decreed to pay to the defendant Great Northern Railway Company for the benefit of said defendant and of its creditors and stockholders, any and all moneys with interest thereon, for which he, said James J. Hill may, upon said accounting be found and held to be liable to said Great Northern Railway Company by reason of the premises, and further to stand to, and abide such further order, directions or de-

91 crees therein as to this Court shall seem meet.

And the Court further certifies that upon said amended bill of complaint and the complainant's motion to remand this cause

to the State Court and upon the said amended bill of complaint and the demurrers filed thereto by the defendants, this Court denied said motion to remand and dismissed the amended bill of complaint and entered a decree of dismissal in accordance therewith holding that it appeared from said amended bill of complaint that there was such diversity of citizenship between the parties complainant and defendant as would confer jurisdiction upon the United States Circuit Court for the Southern District of New York in this cause, within the meaning of the United States Revised Statutes, and that in arranging the parties to this cause relatively to the controversy, the Great Northern Railway Company should not be grouped on the side of the complainant with the result that citizens of the same State would not be parties on both sides of the litigation, and thus deprive this Court of jurisdiction.

The Court further certifies that the amount involved in the controversy, which is the subject matter of this cause, was in excess of Two thousand dollars ($2,000) exclusive of interest and costs.

Done this 26th day of July, Nineteen Hundred and seven.

C. M. HOUGH,
U. S. Dist. Judge, Holding the Circuit Court, So. Dist. of N. Y.

92 (Endorsed:) United States Circuit Court. Southern Dist. of New York.—Clarence H. Venner, Complainant, against Great Northern Railway Company and James J. Hill, Defendants.—Certificate of question of jurisdiction.—Stephen M. Yeaman, Solicitor for Complainant, 15 William Street, New York City.—Copy received Jul- 29 1907, Shearman & Sterling, 44 Wall Street, New York, att'ys for def't Ry. Co.—Copy received July 29, 1907, Simpson, Thacher & Bartlett, Attorneys for Defendant James J. Hill.—U. S. Circuit Court. Southern District N. Y. Filed July 29, 1907, John A. Shields, Clerk.

93 In the Circuit Court of the United States for the Southern District of New York.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

Petition on Appeal.

The above named complainant in the above entitled cause, Clarence H. Venner, conceiving himself aggrieved by an order and decree made and entered by this Court in the above entitled cause, wherein and whereby it was ordered that the motion made by the complainant to remand this action to the State Court on the ground that the Court had no jurisdiction thereof should be denied and that demurrers interposed by the defendants to the amended bill of com-

plaint should be sustained and the said amended bill of complaint should be dismissed, hereby desires to appeal to the Supreme Court of the United States from said order and decree, and, therefore, prays that this, his petition for such appeal, may be allowed and that the transcript of record, proceedings and papers upon which the aforesaid order and decree were made may be sent duly authenticated to the Supreme Court of the United States.

Dated July 25th 1907.

STEPHEN M. YEAMAN,
Attorney for Clarence H. Venner, Complainant.

94 (Endorsed:) United States Circuit Court. Southern District of New York.—Clarence H. Venner, Complainant, against Great Northern Railway Company and James J. Hill, Defendants.—Petition on appeal.—Stephen M. Yeaman, Att'y for Complainant, 15 William St., New York City.—Copy received Jul- 29 1907, Shearman & Sterling, Att'ys for Def't Ry Co.—Copy received Jul- 29, 1907, Simpson, Thacher & Bartlett, Attorneys for Defendant James J. Hill.—Read and ordered on file. C. M. Hough, U. S. J.—U. S. Circuit Court, Southern District N. Y. Filed Jul- 29 1907, John A. Shields, Clerk.

95 In the Circuit Court of the United States for the Southern District of New York.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

Order Allowing Appeal.

The above named complainant, Clarence H. Venner, having presented his petition asking leave to appeal to the Supreme Court of the United States from the order and decree entered in this action denying the motion on behalf of the complainant to remand this cause to the State Court on the ground that this Court had no jurisdiction thereof and sustaining the demurrers to the amended bill of complaint and dismissing said amended bill of complaint.

Now, on motion of Stephen M. Yeaman, solicitor and counsel for the complainant, it is

Ordered that an appeal to the Supreme Court of the United States from the order and decree heretofore filed and entered herein denying the motion to remand this action to the State Court and dismissing the amended bill of complaint herein, be and the same is hereby allowed, and that the certified transcript of record and all proceedings herein be forthwith transmitted duly authenticated to the Supreme Court of the United States, and it is further

96 Ordered that the bond on appeal be fixed at the sum of Two Hundred and Fifty Dollars ($250) as a bond for costs and damages on appeal.

Dated July 26th 1907.

C. M. HOUGH,
U. S. D. J., Holding Circuit Court, So. Dist. of N. Y.

(Endorsed:) United States Circuit Court. Southern District of New York.—Clarence H. Venner, Complainant, against Great Northern Railway Company and James J. Hill, Defendants.—Order Allowing Appeal.—Stephen M. Yeaman, Att'y for Complainant, 15 William St., New York City.—Copy received July 29, 1907, Simpson, Thacher & Bartlett, Attorneys for defendant James J. Hill.—Copy received Jul- 29 1907, Shearman & Sterling, Att'ys for Def't Ry. Co.—U. S. Circuit Court. Southern District N. Y. Filed Jul- 29 1907, John A. Shields, Clerk.

97 In the Circuit Court of the United States for the Southern District of New York.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, Defendants.

Assignment of Errors.

Comes now the complainant in the above entitled cause and assigns errors in the decision and decree of the Circuit Court of the United States, Second Circuit, Southern District of New York, in the above entitled cause as follows:

First. The Court erred in refusing to remand the said cause to the State Court and in entering the order in favor of the defendants denying said motion to remand.

Second. The Court erred in dismissing the amended bill of complaint and in entering the decree in favor of the defendants sustaining the demurrers interposed thereto.

Third. The Court erred in holding that it had jurisdiction of this cause on the ground that there was such diversity of citizenship of the parties thereto as is required by the provisions of the United States Revised Statutes.

98 Fourth. The Court erred in holding that it had jurisdiction of this cause for the reason that in arranging the parties relatively to the controversy, the Great Northern Railway Company was to be grouped on the side of the defendant with the result of not bringing citizens of the same State on both sides of the litigation and thus not depriving this Court of jurisdiction.

Fifth. The Court erred in holding that by reason of the absence of allegations in the amended bill of complaint showing the facts required by Rule 94 in equity it was not required to align the Great Northern Railway Company on the side of the complainant, which

alignment would have brought citizens of the same State on both sides of the litigation and would have deprived this Court of jurisdiction.

Sixth. The Court erred in holding that notwithstanding the absence of allegations in the amended bill of complaint showing the facts required by Rule 94 in equity this cause as one brought in the Supreme Court of the State of New York was one over which this Court would have had original jurisdiction and was, therefore, removable into this Court.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to this Court and prays that such disposition be made thereof as in accordance with the Law and Statutes of the United States in such cases made and provided, and the complainant prays a reversal of the order and decree made and entered by said Court.

STEPHEN M. YEAMAN,
Solicitor for Complainant.

99 (Endorsed:) United States Circuit Court. Southern District of New York.—Clarence H. Venner, Complainant, against Great Northern Railway Company and James J. Hill, Defendants.—Assignment of Errors.—Stephen M. Yeaman, Att'y for Complainant, 15 William St. New York City.—Copy received Jul- 29 1907. Shearman & Sterling, Att'ys for Def't Ry. Co.—Copy received July 29, 1907. Simpson, Thacher & Bartlett, Attorneys for Defendant James J. Hill.—Read and ordered on file by C. M. Hough, U. S. J.—U. S. Circuit Court. Southern District of N. Y. Filed Jul- 29 1907, John A. Shields, Clerk.

100 In the Circuit Court of the United States for the Southern District of New York.

CLARENCE H. VENNER, Complainant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES B. HILL, Defendants.

Bond.

Know all men by these presents:

That we, Clarence H. Venner, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto Great Northern Railway Company and James J. Hill in the full and just sum of Two Hundred and Fifty Dollars ($250) to be paid to the said Great Northern Ralway Company and James J. Hill, their attorneys, executors, administrators, successors and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 25th day of July, 1907.

Whereas, lately at a session of the Circuit Court of the United States, Second Circuit, Southern District of New York, in a suit pending in said Court between the said Clarence H. Venner, complainant, and Great Northern Railway Company and James J. Hill, defendants, an order and decree were rendered against the
101 said Clarence H. Venner denying the motion made by him to remand this case to the State Court on the ground of lack of jurisdiction and dismissing the amended bill of complaint herein, and the said complainant having obtained from the said Court an order allowing an appeal to the Supreme Court of the United States to reverse the aforesaid order and decree and a citation directed to the said Great Northern Railway Company and James J. Hill is about to be issued citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at the City of Washington, District of Columbia,

Now the condition of the above obligation is such that if the said Clarence H. Venner shall prosecute his said appeal to effect and shall answer all damages and costs that may be awarded against him if he fail to make his appeal good, then the above obligation to be void, otherwise to remain in full force and effect.

CLARENCE H. VENNER.
AMERICAN SURETY COMPANY OF NEW YORK,
By R. R. BROWN, *Vice President.*

[SEAL.] Attest:
CORTLANDT S. VAN RENSSELAER,
Attorney.

253215.

102 STATE OF NEW YORK, *County of New York, ss:*

I certify that on this 25th day of July, 1907, before me personally appeared the above named Clarence H. Venner, to me known and known to me to be one of the individuals described in and who executed the above bond and he acknowledged to me that he executed the same.

[SEAL.] J. S. MITCHISON,
Notary Public, Kings County.

Certificate filed in New York County.

The sufficiency of the foregoing bond and the sureties thereon is hereby approved this 26th day of July, 1907.

C. M. HOUGH, *U. S. J.*

STATE AND COUNTY OF NEW YORK, *ss:*

On this 25th day of July, 1907, before me personally appeared R. R. Brown, Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the Town of Palisade, N. J.; that he is

the Vice-President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knew the corporate seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that
103 it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by Law. And the said R. R. Brown further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the Attorneys of said Corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said R. R. Brown, Vice-President.

[SEAL.] JAMES F. HARRISON, JR.,
Notary Public, New York County.

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted and is still in force:

"Resolved, That the President and Vice-Presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however,
104 to be attested in every instance by the Secretary, one of the Assistant Secretaries or one of the Attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, Attorney of the American Surety Company of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at the City of New York, this 25th day of July, 1907.

[SEAL.] CORTLANDT S. VAN RENSSELAER,
Attorney.

(Endorsed:) United States Circuit Court. Southern District of New York.—Clarence H. Venner, Complainant, against Great Northern Railway Company and James J. Hill, Defendants.—Bond.—Stephen M. Yeaman, Att'y for Complainant, 15 William St., N. Y. City. U. S. Circuit Court. Southern District N. Y. Filed July 29 1907, John A. Shields, Clerk.

105 The President of the United States to Great Northern Railway Company and James J. Hill, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, District of Columbia, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States, Second Circuit, Southern District of New York, wherein Clarence H. Venner is the complainant and you are the defendants, to show cause, if any there be, why the order and decree in the said appeal mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness, Hon. C. M. Hough, U. S. Dist. Judge holding the Circuit Court of the United States, Second Circuit, Southern District of New York, this 26th day of July, 1907, and of the Independence of the United States the One hundred and thirty-second.

C. M. HOUGH, *U. S. J.*

(Endorsed:) United States Circuit Court. Southern District of New York.—Clarence H. Vanner, Complainant, against Great Northern Railway Company and James J. Hill, Defendants.—Citation.—Stephen M. Yeaman, Atty. for Complainant, 15 Williams St., New York City.—Copy received, July 27, 1907, Simpson, Thatcher & Bartlett, Atty. for defendant James J. Hill.—
106 Copy received Jul- 27 1907, Shearman & Sterling, 44 Wall Street, New York, attys. for Deft. Gr. North Ry. U. S. Circuit Court. Southern District N. Y. Filed Jul- 29 1907, John A. Shields, Clerk.

107 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to 106 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Clarence H. Venner Complainant-Appellant against Great Northern Railway Company and James J. Hill Defendants-Appellees as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of October in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the said United States the One Hundred and Thirty-second.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Clarence H. Venner Compl't-Appellant *vs.* Great Northern Railway Company and James J. Hill Def'ts-Appellees. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 20,888. S. New York C. C. U. S. Term No. 485. Clarence H. Venner, appellant, *vs.* Great Northern Railway Company and James J. Hill. Filed October 17th, 1907. File No. 20,888.

United States Supreme Court.

OCTOBER TERM, 1907.

CLARENCE H. VENNER,
Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Appellees
No. 485.

Gentlemen:—

PLEASE TO TAKE NOTICE, that upon the record herein, a motion will be made at a session of this Court, to be held at Washington, D. C., on the 20th day of January, 1908, at twelve o'clock noon, or as soon thereafter as counsel can be heard, to advance this cause on the docket of this Court and to submit the same on that day, in conformity with Rule 32 of the Rules of the Supreme Court of the United States.

Dated, New York, December 23d, 1907.

Respectfully,

ABRAM J. ROSE,
Of Counsel for Appellant,
Office & Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

GEORGE H. YEAMAN,
Of Counsel for Appellant,
Office & Post Office Address,
44 Wall Street,
Borough of Manhattan,
New York City.

To

Messrs. Simpson, Thacher & Bartlett,
Solicitors for James J. Hill.
Messrs. Shearman & Sterling,
Solicitors for Great Northern Ry. Co.

United States Supreme Court.

OCTOBER TERM, 1907.

CLARENCE H. VENNER, *Appellant,* vs. GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL, *Appellees*	No. 485.

Now comes Clarence H. Venner, the appellant, by Abram J. Rose and George H. Yeaman, of counsel, and moves this Court to advance this cause upon the docket of this Court, and for an order that the same may be heard in conformity with Rule 32 of this Court, upon the ground that the Circuit Court of the United Sttaes for the Southern District of New York had no jurisdiction as a Court of the United States, sitting in equity, to hear and determine this cause, because:

FIRST: There was no such diversity of citizenship, under a proper alignment of the parties, between the plaintiff and the defendants in this cause as would be sufficient under the United States Statutes to confer jurisdiction upon the said Circuit Court of the United States.

SECOND: That this cause as brought in the Supreme Court of the State of New York, was one over which the

said Circuit Court would not have had original jurisdiction, and was therefore not removable into said Circuit Court.

Statement.

The action was brought by the complainant, Clarence H. Venner, who is a stockholder in the Great Northern Railway Company, in behalf of himself and of other stockholders of said Company similarly situated, for the purpose of obtaining relief with respect to various transactions which have been had between said Great Northern Railway Company and James J. Hill (Record, pp. 1-5).

The action was commenced in the Supreme Court of the State of New York (Record, p. 1), and was removed to the Circuit Court of the United States for the Southern District of New York by the defendants, upon the ground of diversity of citizenship between the plaintiff and the defendants (Record, pp. 7-12). Thereafter the plaintiff moved to remand the case to the said Supreme Court of New York, upon the grounds, among others, that there was no such diversity of citizenship between the plaintiff and the defendants, within the meaning of the Acts of Congress in such case made and provided, as would confer jurisdiction upon the said Circuit Court of the United States; and that the cause was not one of which the Circuit Court would have had original jurisdiction, and therefore was not removable, and that the said Circuit Court was without jurisdiction to hear and determine this cause (Record, p. 26). The said motion was opposed by the defendants and was denied (Record, p. 27). In the third line of notice of motion to remand (Record, p. 26) the word rehearing is a misprint for hearing.

The defendants moved in said Circuit Court that the

complainant be compelled to recast his bill in the form of a bill in equity, which said motion was granted, against the opposition of the plaintiff (Record, pp. 12, 13).

The said bill was so recast, but did not comply with Rule 94, in that it did not state that the complainant was a shareholder at the time of the transactions complained of, nor that his stock had since devolved upon him by operation of law (Record, pp. 13-22). The defendants demurred to the bill as recast (Record, pp. 22-26) and the demurrers were sustained over the objection of the plaintiff, with leave to amend (Record, pp. 38, 39). The amendment was not made (Record, pp. 39, 40), and final decree was entered dismissing plaintiff's bill (Record, p. 40).

Thereupon, the said Circuit Court allowed an appeal to this Court from the said judgment, and made a certificate of the question of jurisdiction involved in the said decision, to-wit. "Whether or not the complainant's "amended bill of complaint showed that there was such "diversity of citizenship between the party complainant "and the parties defendant in this cause as would be suf- "ficient under the provisions of the United States Revised "Statutes, to confer jurisdiction upon the United States "Circuit Court for the Southern District of New York, "of this cause, and whether this cause as brought in the "Supreme Court of the State of New York, was one over "which this Court would have had original jurisdiction, "and was therefore removable into this Court." (Record, p. 42.)

The appeal to this Court has been duly perfected.

The question of jurisdiction involved is an important one, and the case is one of those that may be advanced under Rule 32 of the Supreme Court.

United States Supreme Court.

OCTOBER TERM, 1907.

CLARENCE H. VENNER,
Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Appellees

No. 485.

BRIEF FOR APPELLANT.

Statement.

This action is what is commonly called a stockholder's suit. (See Record, pp. 1 to 5.)

The plaintiff is a citizen of the State of New York; the defendant the Great Northern Railway Company, is a corporation of the State of Minnesota, and the defendant Hill, is a citizen of that State.

The action was commenced in the Supreme Court of the State of New York (see Record, p. 1) the Court of highest original jurisdiction in that State.

The defendants appeared in the State Court and upon their motion the case was removed into the United States Circuit Court for the Southern District of New York

upon the ground of diverse citzenship. (Record, p. 7.)

The plaintiff moved to remand for want of jurisdiction (Record, p. 26), which motion was denied (Record, p. 27).

The complaint in the State Court did not fully comply with the requirements of Rule 94. It was not necessary that it should under the law and practice of New York.

The defendants moved that the plaintiff be required to replead; that is, to recast his complaint in the form of a bill in equity according to the practice in equity in the Circuit Courts of the United States. That motion was granted against the opposition of the plaintiff (Record, p. 13).

The plaintiff complied with the order (Record, pp. 13-23). The compliance was no voluntary submission to the jurisdiction of the Court. He was under compulsion. He had to comply or have his complaint dismissed.

The recast bill in the United States Circuit Court also failed to comply with all the requirements of Rule 94. The defendants demurred to the recast bill (Record, pp. 22-23). The demurrers were sustained with leave to amend (Record, pp. 38-39). The amendment was not made. The failure to amend was followed by a decree dismissing the bill (Record, pp. 40-41).

The case comes into this Court by appeal from that decree upon a certificate of the Court below of the question of jurisdiction (Record, p. 41). Upon the appeal the plaintiff asked to review the order refusing to remand the case and the order allowing the demurrers, and asks the reversal of the decree dismissing the bill, with directions to remand the case to the Supreme Court of New York, whence it was removed, upon the ground that the Circuit Court was without jurisdiction to hear and determine the cause.

The assignment of errors relied upon are as follows:

"FIRST: The Court erred in refusing to remand the said cause to the State Court and in entering the order in favor of the defendants denying said motion to remand.

"SECOND: The Court erred in dismissing the amended bill of complaint and in entering the decree in favor of the defendants sustaining the demurrers interposed thereto.

"THIRD: The Court erred in holding that it had jurisdiction of this cause on the ground that there was such diversity of citizenship of the parties thereto as is required by the provisions of the United States Revised Statutes.

"FOURTH: The Court erred in holding that it had jurisdiction of this cause for the reason that in arranging the parties relatively to the controversy, the Great Northern Railway Company was to be grouped on the side of the defendant with the result of not bringing citizens of the same State on both sides of the litigation and thus not depriving this Court of jurisdiction.

"FIFTH: The Court erred in holding that by reason of the absence of allegations in the amended bill of complaint showing the facts required by Rule 94 in equity it was not required to align the Great Northern Railway Company on the side of the complainant, which alignment would have brought citizens of the same State on both sides of the litigation and would have deprived this Court of jurisdiction.

"SIXTH: The Court erred in holding that notwithstanding the absence of allegations in the amended bill of complaint showing the facts required by Rule 94 in equity, this cause as one brought in the Supreme Court of the State of New York, was one over which this Court would have had original jurisdiction, and

was, therefore, removable into this Court. See Record, pp. 53-54.)

The jurisdiction of the Court below was attacked on two grounds:

1st: That a proper alignment of the parties would defeat jurisdiction.

2nd: That in any event the cause was not one removable into the Circuit Court.

The one question certified to this Court is the question of jurisdiction of the Circuit Court. If the jurisdiction fails upon either of the grounds upon which it was attacked, then the question certified to this Court must be answered in the negative and the decree of dismissal reversed with direction to remand the case.

The contentions of appellant are:

1st: That the Circuit Court should have aligned the Great Northern Railway Company with the plaintiff, which would defeat jurisdiction.

2nd: That Rule 94 does not apply to actions removed from a State Court to a Federal Court.

3rd: That the Circuit Court would have had no original jurisdiction of the case and could not acquire jurisdiction by removal.

4th: That the Circuit Court being wholly without jurisdiction, should have remanded the case to the State Court.

POINT I.

The Circuit Court should have aligned the Great Northern Railway with the plaintiff which would defeat jurisdiction.

FIRST: **The question of jurisdiction is directly raised in and appears by the record.**

By the record it specifically appears that this action was originally begun in the Supreme Court of the State of New York, and upon petition by defendants removed into the Circuit Court on the ground of diverse citizenship of the parties (Record, pp. 7 to 12).

It further specifically appears that a motion to remand this cause to the State Court was made by the plaintiff on the precise ground that the requisite diverse citizenship required as a condition precedent to the jurisdiction of the Circuit Court did not exist (Record, p. 26). This motion was denied by Circuit Judge Lacombe (Record, p. 27).

In addition it has been certified by the Circuit Court that the question of jurisdiction was involved, to wit: whether or not the bill of complaint showed such diversity of citizenship between the party complainant and parties defendant as would be sufficient under the provisions of the United States Revised Statutes to confer jurisdiction upon the United States Circuit Court for the Southern District of New York of this cause, and whether this cause as brought in the Supreme Court of the State of New York was one over which this Court would have had original jurisdiction, and was therefore removable into this Court (Record, p. 42).

The question of jurisdiction is thus directly raised in and appears by the record before this Court.

SECOND: **It also specifically appears by the record that the action is the common one in equity by a stockholder of a corporation suing on behalf of himself and of other stockholders to recover for a wrong alleged to have been done to the corporation by its officers dealing on its behalf to their own personal profit and advantage and to the waste and injury of the corporation, its funds and estate.**

The ground for the action, as appears from the allegation of the bill, is that the defendant Hill while dominating the Board of Directors of the defendant Railway Company, caused it to purchase stock of the Chicago, Burlington & Quincy Ry. Co., whereby he reaped a profit of at least ten millions of dollars and that although demand was made upon the corporation, its directors and Hill, as President, to bring suit to redress the injury sustained, it refused so to do.

That the orignal complaint in the State Court stated a good cause of action was conceded by the Circuit Judge in the opinion sustaining the demurrers (Record, pp. 29, 30). Citing

Young vs. Drake, 8 Hun, 61-64.

Frothingham vs. Broadway, etc., Ry. Co., 9 Civ. Pro., 304-314.

O'Connor vs. Va. P. P. Co., 46 Misc., 530-535.

Frickett vs. Murphy, 46 App. Div., 180-186.

Sayles vs. Central Bank of Rome, 18 Misc., 155-158.

Hanna vs. Lyon, 179 N. Y., 107.

In the *Hanna* case the plaintiff failed to recover because though a stockholder when the ~~work~~ wrong was done he had assigned his stock before he commenced his action.

The opinion of the Court of Appeals of New York by *Chief Judge Alton B. Parker*, says:

> "His rights as a stockholder had passed to the sub-
> "sequent purchaser of the stock and the Appellate Di-
> "vision was, therefore, right in reversing the judgment
> "as to him and dismissing the complaint."

In *Young vs. Drake* (supra) the Supreme Court of New York said:

> "It is enough that the plaintiff was a stockholder
> "when the suit was brought. And if he purchased
> "his stock after the alleged fraud was committed that
> "did not condone the fraud. The plaintiff acquired all
> "the rights of the person from whom he purchased."

The same doctrine obtains in Minnesota, the domicile of the defendant corporation and the State of the citizenship of the defendant Hill.

Stewart vs. Erie, etc., 17 Minn., 372-400-401.

The same rule is stated in the Text books.

In *Cook on Corporations*, it is said:

> "The right which a stockholder has to object to a
> "fraudulent or ultra vires act inheres in his stock, and
> "hence passes to a purchaser of that stock, and such
> "purchaser may bring suit to enjoin or set aside the
> "act or to compel an accounting although the rule is
> "different in the Federal Courts."

Cook on Corporations, Fifth Edition, p. 1882.

The same view is held in New Jersey.

> "That it (the scheme) could be enjoined upon the
> "application of a single stockholder of the purchasing
> "company, and that the fact that such stockholder had
> "obtained his stock after the passage of the resolu-
> "tions and with the avowed design of preventing its
> "consummation, would not affect his right to relief."

Elkins vs. Camden & At. R. R. Co., 36 N. J. Eq., 514.

"The right of a stockholder to enjoin an interference "with an election is not prejudiced by the fact that a "rival company purchased his stock for him."

Camden, &c., R. R. Co. vs. Elkins, 37 N. J. Eq., 273.

And in Alabama:

"But this (Rule 94) is not a general principle of "law and this Court has never adopted it as a rule."

Parsons vs. Joseph, 92 Ala., 403, 405.

Montgomery Light Co. vs. Lahay, 121 Ala., 131-136.

And in Montana:

Forrester vs. B. & M. Min. Co., 21 Mont., 544-549, 550.

Same on rehearing, 21 Mont., 565.

And in Illinois:

City of Chicago vs. Cameron, 22 Ill. App., 91, 104.

Affirmed on appeal to Supreme Court of Illinois, 120 Ill., 447-463.

And in Minnesota:

Stewart vs. Erie, &c., 17 Minn., 372.

In *Boardman vs. Lake Shore, &c.*, 84 N. Y., 157, the Court of Appeals of New York, discussing the nature of corporation stock and the transfer thereof, at pages 177-8-9 states as "the general rule which is upheld by authority that a transfer of stock of a corporation carried with it to the transferee its proportionate share of the assets of the Company."

In the case at bar the right of action which accrued to the corporation was an asset, the right to an action to *recover* assets. Any stockholder under these authorities, and upon the refusal of the corporation to sue, could commence an action for the benefit of the Company. Other New York cases are cited under Point I ante.

The Courts of the United States take judicial notice of the laws of the States. Under the law of the State of New York, where the Circuit Court was sitting, the complaint as filed in the State Court was well brought, and alleged facts making a complete cause of action.

THIRD: **Such being the nature of the action, the only possible ground of Federal jurisdiction would be the diverse citizenship of the parties, as there is no pretense that any of the other grounds authorizing the commencement of an action in the Federal Courts or authorizing removal thereto from the State Court, exists.**

Unless, then, the required diversity of citizenship is shown to exist, the Circuit Court was wholly without jurisdiction.

FOURTH: **The facts necessary to confer jurisdiction on a United States Court to entertain an action of the nature of the one at bar when the sole ground of jurisdiction is the diverse citizenship of the parties have been expressly laid down and defined in the well-known Rule 94 of Rules of Practice in Equity.**

The well-known and universally recognized requirements of that rule are:

1. That the bill must be verified by oath.

2. That the bill must allege:

(a) That the plaintiff was a shareholder at the time

of the transaction of which he complains, or that his shares had devolved upon him since by operation of law.

(b) That the suit is not a collusive one to confer jurisdiction on a Court of the United States, and

(c) That the plaintiff has made efforts to secure action by the managing directors and shareholders, the facts regarding which must be set forth with particularity, and also the causes of the failure to obtain such action.

(See Rule 94 in Equity.)

FIFTH: **The reasons which gave rise to the promulgation of this rule and the abuses which it was intended to prevent are well known.**

The direct object and purpose was to prevent the Courts of the United States from being over-burdened with actions brought by stockholders of corporations, which, *except for the diverse citizenship of the stockholder appearing as complainant would have to be brought in a State Court*, of competent jurisdiction.

Hawes vs. Oakland, 104 U. S., 450.
Detroit vs. Dean, 106 U. S., 537.
City of Quincy vs. Steele, 120 U. S., 241.

In fact the promulgation of Rule 94 was the direct outcome and effect of the decision by this Court in *Hawes vs. Oakland* (supra) and was intended to formulate into a rule the views expressed in that opinion. The opinion in *Hawes vs. Oakland* was written by *Mr. Justice Miller*, who also wrote the opinion in the subsequent case of *City of Quincy vs. Steele*, and in which latter case he took occasion to point out specifically the abuses intended to be corrected and prevented by the decision in the *Hawes* case and the rule promulgated after its rendition.

He said:

"Prior to 1875 cases had come into the Courts of "the United States, especially into the Circuit Courts, "where citizenship had been simulated and parties im- "properly made or joined either as plaintiffs or de- "fendants for the purpose of creating a case cognizable "in the Circuit Courts originally or removable thereto "from the State Courts; and as it very frequently oc- "curred that both plaintiffs and defendants were will- "ing to seek that Court in preference to the State "Courts, it had been found very difficult to prevent "these improper cases from being tried in those Courts. "In the Act of March 3, 1875, an attempt was made "to correct this evil, and by the fifth section of that "act it was declared 'that if in any suit commenced in "'the Circuit Court or removed from a State Court to a "'Circuit Court of the United States it shall appear "'to the satisfaction of said Circuit Court at any time "'after such suit has been brought or removed thereto "'that such suit does not really and substantially in- "'volve a dispute or controversy properly within the "'jurisdiction of said Circuit Court, or that the par- "'ties to said suit have been improperly or collusively "'made or joined either as plaintiffs or defendants for "'the purpose of creating a case cognizable or remova- "'ble under this act, the said Circuit Court shall pro- "'ceed no further therein, but shall dismiss the suit "'or remand it to the Court from whence it was re- "'moved as justice may require.'

"In the case of *Hawes vs. Oakland*, 104 U. S., 456, "and *Huntington vs. Palmer*, *id.*, 482, the question of "the growth of the form of invoking federal jurisdic- "tion where it does not otherwise exist, by the attempt "of a corporation which cannot sue in the Federal Court, "to bring its grievance into that Court by a suit in "the name of one of its stockholders who has the re- "quisite citizenship was very much considered. In "order to give effect to the principles there laid down,

"this Court at that term adopted Rule 94 of the Rules "of Practice for Courts of Equity of the United States."

* * * * * * *

(City of Quincy vs. Steele.)

It cannot therefore be doubted, and this Court has in so many words expressly said that Rule 94 was formulated for the express purpose of correcting the evil of foisting upon the Courts of the United States actions brought to redress wrongs done to corporations which should have been brought in the State Courts, and the only ground for jurisdiction by the Federal Courts over which were the alleged diversity of citizenship often collusively created, by simply bringing the suit in the name of a stockholder having the requisite diverse citizenship. Obviously there was no attempt by this rule to limit the jurisdiction of the Federal Courts over actions of such a character properly brought therein, but only to prevent the improper institution, in Federal Courts, in the first instance, of actions falling within the prohibitions of the rule.

SIXTH: **Because of the requirements of Rule 94 in stockholders' actions the question of jurisdiction on the ground of diversity of citizenship is a preliminary one, and if the conditions prescribed are not shown to exist, the corporation in whose behalf the action is brought, will be aligned on the side of the complainant in the controversy, and if after such alignment the diversity of citizenship required for jurisdiction does not exist, the action will be dismissed if originally brought in the United States Court, or remanded if originally brought in a State Court, and removed therefrom into a Federal Court.**

The reason for such alignment is that in such actions

the corporation is the real party plaintiff and the right of action in the stockholder purely derivative. While in a State Court an action may be maintained by a stockholder in his own name upon a complaint showing sufficient grounds for equitable intervention alone, nevertheless, if he seeks relief in a Federal Court on the ground of diversity of citizenship he must meet the requirements of Rule 94, and if he does not, the question of jurisdiction must be determined, not by the diversity between his citizenship and that of the defendants, but by the diversity of citizenship between the corporation in whose behalf he sues and that of the other defendants.

In other words, if the necessary jurisdictional facts required by Rule 94 do not appear, the corporation will be aligned as the party plaintiff, and the question of jurisdiction determined as if the suit had been orignally brought by it and not by a stockholder in its behalf.

Elkins vs. City of Chicago, 119 Fed. Rep., p. 957.

Kemmerer vs. Haggerty, 139 Fed. Rep., p. 693.

Dickinson vs. Consolidated Traction Company, 114 Fed. Rep., p. 232.

Waller vs. Coler, 125 Fed. Rep., p. 821.

Grael vs. United Electric Company, 132 Fed. Rep., 252.

In *Elkins vs. City of Chicago* (supra), a Bill was filed in the Circuit Court for the Northern District of Illinois by a stockholder to enforce rights belonging to the corporation. The sole ground for federal jurisdiction was the diversity of citizenship between the stockholder and the defendants. It was held, that the Court was without jurisdiction because the corporation in whose behalf the action was brought was a citizen of the same State as the other defendants.

In the opinion, District Judge SEAMAN, it was said:

> "Diverse citizenship of the parties appears as they "are arranged by the bill—the complainant being a "citizen of Pennsylvania while each of the defendants "is an Illinois corporation—but such an arrangement "is not controlling for the present inquiry in any as- "pect of the case. It is the duty of the Court for juris- "dictional purposes to ascertain the necessary parties "to the suit and align them upon one side or the other "in conformity with their true interests and attitude "irrespective of their designations in the bill. So con- "sidered, the interests of the complainant as stock- "holder of the charter corporation and of the corpora- "tion itself are entirely identical, and aside from any "question as to the interests of the lessee or operating "corporations named as defendants, *such status is a "bar to jurisdiction based alone on diversity of citizen- "ship, unless compliance with equity Rule 94 appears in "the allegations of the bill and saves the case from the "general doctrine of alignment of parties.*"

The learned Judge then discussed the allegations of the bill and their sufficiency under the requirements of Rule 94, and after reaching a conclusion that they were not a sufficient compliance therewith, said:

> "I am of opinion that the allegations of the bill do "not sustain jurisdiction on the ground of diverse cit- "izenship."

Elkins vs. City of Chicago (supra).

In *Kemmerer vs. Haggerty* (supra), a corporation being a citizen of the same State as the defendants, and therefore incapable of suing in the Federal Courts, brought a suit in the State Courts to restrain the defendants from inducing its employees to strike, pending which the complainants who were non-resident stockholders made a demand on the officers of the corporation to bring suit in

the Federal Courts, knowing that the corporation could not do so, and on the corporation's refusal themselves filed a bill for such relief in the Federal Court. It was held that the Circuit Court was without jurisdiction because the facts alleged did not constitute a compliance with Equity Rule 94. *Circuit Judge Goff said that it was not necessary for him to dispose of the contention of the defendants as to the insufficiency of the bill as he had reached the conclusion that the Court was without jurisdiction of the action.* As grounds for this conclusion he stated as follows:

"The Pennsylvania Consolidated Coal Company, a "West Virginia corporation, one of the defendants, "could not under the provisions of existing law main- "tain a suit in this Court against its co-defendants who "are citizens of West Virginia. It is entirely clear that "said company acting by and through some of its of- "ficials in connection with some of its stockholders en- "deavored to create a condition of affairs that would "justify an application to this Court for an injunction "and that would make applicable to this litigation the "requirements of the 94th equity rule as announced by "the Supreme Court of the United States. It appears "that said company in its own name acting by its di- "rectors and other officials had before the institution "of these proceedings filed in the Circuit Court of Tay- "lor County, West Virginia, a suit the object of which "was to obtain from that jurisdiction in substance the "relief now asked of this Court. That suit was a recog- "nition of the limitations placed by law on the juris- "diction of this Court, and the fact that it was sub- "sequently abandoned after the complainants in this "suit, who were familiar with that litigation and some "of whom actively engaged in its prosecution, supposed "that they had qualified themselves for this jurisdiction, "emphasizes the effort that has been made in this case

"to evade the legislation of the Congress and of the rules "applicable thereto relating to the diverse citizenship "of litigants in this Court. The complainants, stock- "holders in the defendant company, did not endeavor "to induce the directors of that company to institute a "suit in this Court, having for its object the protec- "tion of the property and assets of the company for "they were well aware that this Court would not have "had jurisdiction of such litigation for the reason that "the parties complained of were citizens of the State "of Virginia. It was not necessary for the complain- "ing stockholders to ask the directors to sue in the "Courts of the State of West Virginia where the juris- "diction was unquestioned for such a suit for the pur- "pose mentioned was then pending. What the com- "plainants intended to do and what they in fact did "was to have the management of the coal company de- "clare that neither they as officials thereof, nor the "company as a corporation would institute and prose- "cute the suit referred to; they by providing, as they "supposed, a method by which the complainants who "were stockholders and citizens of the State of Penn- "sylvania, would be able to sue in this Court for the "purpose mentioned. Such likely would have been the "result had the effort been an honest endeavor to fur- "ther a sincere intention, and not a simulated action "of designing men who collusively formulated the "scheme and prepared the answer to the request that "suit be brought before the petition containing it had "been submitted for the consideration of those whose "action it requested. It is quite evident that it was "the plan of the complainants and of some of the di- "rectors of the coal company collusively acting together "that purpose to make the situation fit the conditions "indicated by the terms of Equity Rule 94. And when "this conclusion has been reached it follows that any "pretense of jurisdiction by this Court over this con- "troversy has disappeared. The refusal of their request

"was the one thing they wished. The granting of it "would have been the one thing that would have circum- "vented their plans. Their conduct was insincere, their "effort was pretended and the action they desired was "not indicated by the request they submitted. The ques- "tion here involved is of great importance, including "as it does, the principles upon which in many instances "the federal jurisprudence is based. *Where the right "to sustain a suit in this Court depends upon the cit- "izenship of the parties, the positive requirement of the "law is that the litigants shall be citizens of different "States.* The case made by the bill is in fact a contro- "versy between the Pennsylvania Consolidated Coal "Company, a corporation, and citizens of West Virginia, "and the defendants Haggerty, Noon, True and others, "all likewise citizens of this State. The efforts of com- "plainants, citzens of the State of Pennsylvania to pro- "duce a diversity of citizenship necessary to sustain "the controversy in their names, utterly fails to meet "the requirements indicated by the decision of the "Courts relating to Equity Rule 94, which was adopted "for the purpose of giving effect to the principles enun- "ciated by the Supreme Court of the United States in "*Hawes vs. Oakland*, 104 U. S., 450. * * * * *"

"By virtue of the fifth section of the Act of Con- "gress of March 3, 1875, Chapter 137, 18 Stat., 460 (U. "S. Compiled Statutes of 1901, p. 408), relating to ef- "forts to impose upon the Courts of the United States "the cognizance of those cases not fairly belonging to "them—finding as I do that this suit does not involve "a dispute properly within the jurisdiction of this Court "and that some of the parties to it have been collusively "joined for the purpose of creating a case cognizable un- "der said act—it is my duty to proceed no further "with this case."

Kemmerer vs. Haggerty (supra).

In *Dickinson vs. Consolidated Traction Company* (supra), Circuit Court Judge Gray, writing for the Circuit

Court, District of New Jersey, entertained similar views as to the purpose and effect of Rule 94.

The particular defect in the bill in that case was that there was no allegation that the suit was not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

As to the effect of the absence of such an allegation Judge Gray said:

> "This rule (Rule 94) of course did not and could not "create the jurisdiction, the exercise of which it thus "properly undertakes to regulate. The esential juris- "dictional facts are prescribed by the settled equitable "doctrine above referred to, and by the constitutional "requirement of a bona fide diverse citizenship. The "manner in which jurisdiction may be invoked in the "Federal Courts is prescribed by the said rule. * * *
>
> "The rule is binding upon this Court, and it is with- "out authority to entertain a suit in equity wherein the "bill of complaint is lacking as to any of its require- "ments. * * * * * We think, however, that the "defect is not merely technical or formal. It is juris- "dictional. It was within the power of the Supreme "Court to require by rule that essential jurisdictional "facts should appear by averment in the bill of com- "plaint, that the bill should be sworn to, and that the "right of the Circuit Court to entertain the suit should "be conditioned upon the presence of such averments. "An allegation in the bill under oath that there is no "collusion, is a condition precedent to the jurisdiction "of this Court over the case. This Court cannot permit "a bill to be amended in a case over which it has no "jurisdiction."
>
> *Dickinson vs. Consolidated Traction Co.* (supra).

In *Waller vs. Coler* (supra) the bill was filed by stockholders of a trust company against the corporation and

others, but did not conform to the requirements of Rule 94 by showing the efforts made to secure action by the corporation. A motion to dismiss was made for lack of jurisdiction. In granting the motion, *Circuit Judge Lacombe,* writing, said:

"If the trust company defendant were aligned with "the stockholders complaining there would be citizens "of the same State on both sides of the controversy, and "this Court would be without jurisdiction. It is mani- "fest from the bill that the company rightfully belongs "on the complainant's side of the controversy, but it is "contended that the wholesome rule which aligns par- "ties according to interest does not apply to stockhold- "ers' actions against the corporation, and other parties, "founded on rights which may properly be asserted by "the corporation."

"The case of *De Neufville vs. N. Y. & N. R. R.*, 81 "Federal 10, decided in this circuit, is authority for this "propositon, but intimates that it should be applied "only in cases which are brought within the 94th rule "in equity. The bill in this cause does not comply with "the requirements of that rule which provides that it "must set forth with particularity the efforts of the "plaintiff to secure such action as he desires on the "part of the managing directors or trustees, and, if "necessary, of the shareholders and the causes of his "failure to obtain such action. If it be conceded that "the plaintiff has set forth with sufficient particularity "his efforts to induce the directors so to act and the "causes of his failure to secure such action by them, "it then becomes necessary to set forth with equal par- "ticularity his efforts to secure action on the part of "the stockholders or at least show some good reason why "any such effort would be futile, as for instance, that "a majority of the stockholders are hostile to complain- "ant's proposed action. No averments of this sort, "however, are found in the bill and the cause is there-

"fore not brought within the 94th rule, and so not ex-
"cepted from the general rule which aligns parties ac-
"cording to interest. Such alignment brings a citizen
"of New York on each side of the controversy and leaves
"this Court without jurisdiction."

Waller vs. Coler (supra).

Here, then, we submit, are decisions by Circuit Courts in various circuits expressly holding that in determining the question of a diverse citizenship necessary to confer jurisdiction on the Federal Courts in actions of the nature of the one in the case at bar, the corporation must be aligned on the part of the complainant unless full compliance with the requirements of Rule 94 is made to appear, and that if after such alignment the corporation is a citizen of the same State as the defendants, the Court is absolutely without jurisdiction.

SEVENTH: **Applying these rules to the case at bar, the Great Northern Railway Company must be aligned with the plaintiff.**

The allegations of the bill clearly do not meet the requirements of Rule 94:

1st: There is no allegation that the plaintiff was a stockholder at the time the cause of action arose, or that he thereafter became a stockholder by devolution of law.

2nd: There is no allegation that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a cause of which it would not otherwise have cognizance.

In these respects, therefore, there is no compliance with the rule. Hence under the decisions above referred to, this case cannot be taken out of the application of the wholesome rule that for the purpose of determining jurisdic-

tion on the ground of diverse citizenship, the real party in interest will be aligned on the part of the complainant.

Brown vs. Strode, 15 Cranch, 303.

McNutt vs. Bland, 2 How., 9.

Maryland use of Markley vs. Baldwin, 112 U. S., 490.

Stewart vs. Baltimore & Ohio R. R. Co., 168 U. S., 445.

EIGHTH: **By refusing to apply the principles enunciated in the case at bar, the object and purpose of Rule 94 have been defeated and violated.**

The complainant did not seek to foist this litigation upon the Circuit Court, but commenced his action in the Supreme Court of the State of New York, as he had the right to do, and alleged in his complaint facts sufficient to entitle him to relief under the authorities in that State, but the defendants, not content to try out the issues in the State Court, removed the case into the Circuit Court on the ground, and the only ground, of the alleged diversity of citizenship between the complainant and the defendants; thus they, and not the plaintiff, are guilty of seeking relief in a Federal Court in an action not capable of being originally brought therein nor properly removable thereto.

If the practice pursued in the case at bar be approved by this Court, then the very evils which are pointed out in *Hawes vs. Oakland*, and which were provided against by the promulgation of Rule 94 will flourish with renewed vigor, and the same intolerable state of affairs will be created as existed before that decision and rule were enunciated.

While this case is somewhat anomalous, as here the de-

fendants rather than the complainant, are seeking to foist upon the Federal Courts a case which does not properly belong therein, nevertheless the same rules must be held to govern as if the plaintiff had brought this action originally in the Circuit Court of the United States, in which event there can be no question that the bill would have been dismissed for lack of jurisdiction to entertain it.

NINTH: The learned Judge sustaining the demurrers to the complaint seems to have regarded the decision denying the motion to remand as preventing him from passing upon the question of the jurisdiction of the Court to hear and determine the case, and confined his decision to the question whether, assuming that the Court had jurisdiction, the bill alleged facts sufficient to constitute a cause of action.

Venner vs. Great Northern Ry. Co., 153 Fed. Rep., 408 at page 418.

The whole trend of Judge Ray's opinion shows that he was considering only the effect of the requirements of Rule 94 on the sufficiency of the cause of action.

Under a subsequent point we will have occasion to consider the views expressed by *Judge Ray.*

TENTH: Under this Point, we therefore respectfully submit that as the bill fails to meet the requirements of Rule 94, the Great Northern Railway Company, as the real party in interest, must be aligned with the plaintiff, and as by such alignment citizens of the same State appear on both sides of the controversy, it was error for the Court to entertain jurisdiction for the purpose of deciding that the bill was insufficient in law.

POINT II.

Rule 94 does not apply to actions removed from a State Court to a Federal Court.

FIRST: Counsel have no intention of raising any unseemly discussion of the wisdom and justice of Rule 94. On the contrary, as shown by the cases referred to in the previous Point, it was intended to correct an admitted abuse.

Some of its provisions are in general force in the equity jurisprudence and practice of the State Courts, but the rule added an element previously unknown in the equity jurisprudence of most of the States. And it is permissible to submit that allowing a stockholder, who acquires his stock after the wrong was done to bring such an action on behalf of the company, that company being under adverse control, is a proposition which has commanded very eminent judicial approval.

Our only attempt in this Point is to show the anomalous situation in which the whole subject is placed by the application of Rule 94 by the Court below.

As we have said, under the law of the State of New York, where the Circuit Court was sitting, the complaint as filed in the State Court was well brought and alleged facts making a complete cause of action.

To hold that such a cause may be removed because only of the diversity of citizenship; that when removed the plaintiff may be compelled to replead and put his complaint into the form of a bill in equity, usual in the Circuit Court, and then to sustain a demurrer because of non-compliance with Rule 94, which was not required by the Court where the suit was originally brought, and for such non-compliance to dismiss his bill from the Circuit Court to which

it was removed, is to deprive the citizen of his property, deprive him of a right of action which is his property, and this in virtue of what the Court below held to be the effect of Rule 94—an effect never intended, never contemplated, when the rule was adopted.

In cases where jurisdiction depends on diversity of citizenship, the national government is not concerned further than to furnish an impartial arbiter between persons whose legal rights may or may not be governed entirely by State laws.

The complaint in the State Court averred a valid cause of action. That cause of action was property. The right to it is a rule of property. The right inhered in the plaintiff's ownership of the stock of the Great Northern Railway Company.

The right under the law of the State of New York and under the law of Minnesota was as much a property right as the plaintiff's right or interest in the property and assets of the company after the payment of its debts.

From the facts of the case the question is sharply presented: Is it competent by the removal of a cause from a State Court into a Court of the United States to deprive a plaintiff of a property right to which he was entitled under the law of the State where the action was originally brought?

To give citizens access to an impartial tribunal was the whole object of the provision for removal of causes. When the plaintiff has chosen his forum he cannot remove the cause. Repealing the right of removal by the plaintiff in an action and confining that right to the defendant has emphasized the original theory and object of removal.

No provision for removal adopted by Congress from the original judiciary act down to this time ever would

have received the sanction of the national Legislature if it had been supposed that the result of the right of removal would be not merely to provide an impartial tribunal for the trial of the action, but also as an incident of removal to defeat the action by bringing the plaintiff's case under the operation of a rule holding that he has no right of action. No member of either house of Congress ever voted for a legislative provision for removal under the belief that it would be made to work such a result, and no such result was intended, contemplated, not even suspected or dreamed of.

Rule 94 was no more intended by this Court to work this anomalous result than did Congress in enacting this Statute.

No one would intimate that this Court by adopting Rule 94 had assumed to legislate upon a vital matter for all the States of the Union.

An enactment by Congress that a stockholder must aver in a suit in a State Court that he owned his stock, when the alleged wrong was done, would be manifestly unconstitutional. But the learned Court below and counsel for the appellees have given to Rule 94 the effect which Congress could not give to a Statute.

Moreover the express terms of the Rule itself show that it was intended to apply only to causes instituted in the Circuit Courts of the United States.

The provision of the Rule requiring a statement that the suit was not collusive "to confer on a Court of the "United States jurisdiction of a case of which it would "not otherwise have cognizance," shows the properly limited application and effect of the Rule.

SECOND: **That the Rule was intended to apply only to actions instituted in the Federal Courts, and not to ac-**

tions removed thereto from a State Court has, moreover, been the interpretation given to the Rule by the Federal Courts.

Earle vs. Seattle, etc., R. R. Co., 56 Fed. Rep., 909.

Evans vs. Union Pa. Ry. Co., 58 Fed. Rep., 497.

In *Earle vs. Seattle, etc., R. R. Co.* (supra), it was said:

> "The bill of complaint is not, because of failure to "set forth therein the efforts of complainant and to "secure action of the Board of Trustees, in accordance "with Equity Rule 94, insufficient. This suit was com- "menced in one of the Courts of this State and re- "moved hither by the defendants. Rule 94 has refer- "ence to suits commenced originally in the national "Courts."

In *Evans vs. Union Pa. R. R. Co.* (supra), it was also said:

> "Rule 94 of the Supreme Court has no technical "force in a case removed from a State Court. In "such case the question is whether the State Court "had jurisdiction and whether the Circuit Court has "the same jurisdiction in succession to the State "Court."

Evans vs. Union Pa. Ry. Co. (supra).

See also

City of Chicago vs. Camerson, 22 Ill. App., 91-102.

POINT III.

The Circuit Court had no original jurisdiction of the case and could not acquire jurisdiction by removal.

FIRST: Some of the grounds to remand the case were as follows:

"SECOND: That the record in this cause does not "present a case removable from the State Court to "the Court under the statutes governing such cases."

"THIRD: That the Circuit Court has no jurisdiction "of this action under said attempted removal."

"FOURTH: That the Circuit Court is without juris-"diction to hear and determine this cause." (See Record, p. 26.)

The assignment of error pertinent to this question is that:

"SIXTH: The Court erred in holding that notwith-"standing the absence of allegations in the amended "bill of complaint showing the facts required by "Rule 94 in equity, this cause as one brought in the "Supreme Court of the State of New York, was one "over which the Circuit Court would have had original "jurisdiction and was, therefore, removable into that "Court." (See Record, p. 54.)

SECOND: Jurisdiction combines, and is based upon, two elements: the person, and the subject matter of controversy. A Court may have jurisdiction of the person and not of the subject, and it may have jurisdiction of the subject matter and not of the person. The two elements must be combined to give "jurisdiction to hear and determine." In matters of exclusive legal cognizance Courts of Equity have no jurisdiction over the sub-

ject matter, and in matters of exclusive equitable cognizance, Courts of Law have no jurisdiction of the subject matter. It is very significant that the judiciary act of 1789, and the statutes since then use the two words, jurisdiction and cognizance, as convertible and synonimous terms. They are used to describe the capacity to hear and determine. The elements of that capacity are well known.

The result is not changed if a bill in the State Court was good, but would not have been good in a United States Circuit Court. The fact of removal cannot increase the jurisdiction of a Circuit Court. A bill stating jurisdictional facts in a State Court, but which would be defective in a United States Circuit Court, cannot be made effective and sufficient as to the jurisdiction of the Circuit Court by removal to that Court. The Circuit Court as a Court of the United States, has no power to pass on the merits of such a bill; and the statute expressly requires it to be remanded. If such a cause be removed from a State Court to a Federal Court, then in the sense of the statutes organizing the Federal Courts, and under the decisions of this Court, the Federal Courts cannot take cognizance of the subject matter. The bill as framed in the State Court would not have given a Federal Court jurisdiction. Not only the statutes, but the plain justice and propriety of the matter, unite in requiring that such a suit must be remanded to the Court from which it was removed.

It is a question upon which it is easy to fall into erroneous reasoning. For instance, it might be argued: This is a cause in equity; it was such in the State Court, and causes in equity are cognizable in the Circuit Court. But for non-compliance with Rule 94 the bill would have been good if originally brought in the

Circuit Court. That defect does not deprive that Court of its general jurisdiction in equity. Therefore, the case being removable for diverse citizenship, the decree of dismissal was right. This argument assumes diversity of citizenship which we controvert.

Besides that, the fallacy of such reasoning lies in the assumption that, because in its nature the action in the State Court was of equitable cognizance and called for only equitable remedies, therefore the Federal Court would have cognizance of the whole case when it was removed upon the alleged ground of diverse citizenship. The Federal Courts would not have had original jurisdiction because of a material defect, which was not a defect in the State Court.

The better and a sound course of reason would be as follows:

The constitution and statutes give the Federal Courts jurisdiction of certain classes of cases "in law and equity." Equitable jurisdiction or cognizance means of cases embraced in the term "equity," that is, the established system of equity jurisprudence as ascertained by the decisions of the United States Courts. This Court, by Rule 94 and by judicial determination in the case which occasioned the adoption and promulgation of the Rule, has very clearly defined a class of cases which are not embraced within the scope and remedial provisions of that system of equity jurisprudence as administered by the Federal Courts. Therefore the Federal Courts of original jurisdiction have not equitable cognizance of such a case. Therefore such cases cannot be brought in those Courts. Therefore, such a case when removed from a State to a Federal Court should be remanded *for lack of jurisdiction of*

the subject matter. To say that a bill in a State Court has no equity because it would have had none in a Federal Court, is to assume more than has ever been decided.

It is clearly within the rightful and necessary power and jurisdiction of this Court to determine what *is a case in equity*, what facts constitute such a case, in order to give the Federal Courts original jurisdiction. The Constitution mentions "a case in equity" between parties of diverse citizenship. It did not define "a case in equity". This Court has with great precision done that by the process of exclusion. It has defined with very great accuracy a class of cases of which those Courts have no jurisdiction. In *Hawes vs. Oakland* it was decided that certain facts must appear in the bill to confer jurisdiction upon a United States Court in a specified class of cases. This Court distinctly pronounced the facts enumerated to be jurisdictional. Among them is the fact that the complainant owned his stock at the time the wrong was done. Very clearly then the Federal Circuit Courts have not jurisdiction of the excluded class of cases because the subject matter—the allegations of fact necessary to bring such a cause within the equitable cognizance of the Court—are absent.

It has been said with great weight and wisdom that the constitution is "an instrument of enumeration and not of definitions". That being so, it is an absolute necessity that this Court should have power to "define" a case in equity and determine whether the facts of a given case originally brought in a Federal Court, bring that case within the cognizance of Federal Courts sitting in equity. If the facts averred in the bill do not make such a case in the judgment of this Court, then

the Federal Courts sitting in equity have no jurisdiction to hear and determine it. But neither Congress nor any Federal Court can define what shall make a cause in equity in the State Courts.

The opinion below refers to the views expressed by this Court in *Del. Co. Commrs. vs. Diebold*, 133 U. S. 473; *Claflin vs. Commonwealth Ins. Co.*, 110 U. S., 81; *City of Lexington vs. Butler*, 14 Wall. 282; and *Bushnell vs. Kennedy*, 9 Wall., 387, touching the effect upon removed causes of the provision that the Circuit Courts shall not have cognizance "of any suit founded on contract unless such suit could have been prosecuted in such Courts to recover thereon if no assignment had been made," &c., and says:

> "These cases would seem to hold that notwith-
> "standing an express special limitation on the juris-
> "diction of the Circuit Court, as to actions commenc-
> "ed therein, such limitation has no application to
> "a suit commenced in a State Court and removed
> "to the Circuit Court, there being of course, the
> "necessary diversity of citizenship and amount in
> "controversy to bring the case within the general
> "jurisdiction of the Court. But this limitation on
> "the right of a plaintiff to bring his suit in the
> "Circuit Court is not necessarily a declaration that
> "he has no cause of action, legal or equitable. * *
> " * On the other hand, equity rule 94 and the cases
> "cited, seem to hold that a shareholder in a corpo-
> "ration has no cause of action in equity in a case like
> "this anywhere, unless he held his shares at the
> "time of the transaction complained of, or that they
> "have devolved upon him by operation of law since."
> Record pp. 31, 32.

This substantially holds that Rule 94 was an act of legislation, limiting the equitable cognizance of the

State Courts anywhere. Without the use of that word "anywhere" the attempt to apply those cases to the case at bar would have been in vain. If that word "anywhere" be discarded, as it evidently must be, then the plaintiff stated a good cause of action by his complaint in the State Court; as is elsewhere admitted in the opinion of the Court below.

The cases cited involve the construction of the 11th and 12th sections of the Judiciary Act of 1789. In the Lexington case, Mr. Justice Clifford said:

> "Suits may properly be removed from a State "Court into the Circuit Court in cases where the juris- "diction of the Circuit Court, if the suit has been "originally commenced there, could not have been "sustained, as the 12th section of the Judiciary Act "(the section providing for removal) *does not con- "tain any such restriction* as that contained in the "11th section of the Act defining the original juris- "diction of the Circuit Courts".

Now the present statutes do say, in terms, that only suits of which the Circuit Court would have original jurisdiction, may be removed, in certain cases.

The argument in those cases was based upon the fact that the limitation upon jurisdiction, found in Section 11 of the Act of 1789, excluding assignees in certain cases, is not found in Section 12 providing removal, and therefore jurisdiction by removal was broader than original jurisdiction. But since the Acts of 1887-8, it is very clear that the intent is to confine the right of removal to cases originally cognizable in the Circuit Courts of the United States.

In *Mexican National Railroad Co. vs. Davidson*, 157 U. S., 201, 39 Law Ed., 672, this Court did not in terms

overrule the *Claflin* and *Diebold* cases in their construction of the Act of 1788, but pointed out the change of language in the Act of 1887-8, as containing a radical difference from Section 12 of the Act of 1789 and Section 2 of the Act of 1875, and concluded by saying:

> "We must hold, therefore, as has indeed already "been ruled, *Tenn. vs. Union & Planters' Bank*, "152 U. S. 454, 461 (38 Law Ed., 511, 514) that the "jurisdiction of the Circuit Courts on removal by "the defendants, under this Section, is limited to such "suits as might have been brought in that Court "by the plaintiff under the first Section."

That case seems to have been overlooked by the Court below.

The construction of Rule 94 by the Court below makes it a contrivance to enable the defendant to give the Circuit Court jurisdiction of a non-removable cause and to forthwith proceed, not to try it on the rules of law and property obtaining in the State Court, but to dismiss it on the merits when demurred to. If the Circuit Court has that power, if it can retain the bill, not for hearing the cause, but solely for the purpose of dismissing it for a reason not valid in the State Court, then surely it ought to have been sent back to the State Court from which it was removed, a Court which did have jurisdiction over the matter of the bill and where it would be held that the bill had equity.

Other than the national banks, the corporations of this country are created and exist under State laws. They derive their franchises and powers from State laws. Their charters may be amended or repealed by State laws. They are subject to quo warranto proceedings in State Courts and not in the National Courts. Their

duties to the public and the rights of the public and all stockholders are defined by State laws and judicial decisions having the force of law. The State Courts are the natural forums in which actions by and against them should be brought in all matters depending for their solution upon State laws. This Court has recognized these facts, and Rule 94 was made and promulgated to prevent this Court from being flooded with actions that should be brought in the State Courts.

The rule was not conceived for the purpose of depriving a stockholder of a right of action vested under the laws of any State. It was only intended to prevent the abuse and frauds upon the jurisdiction so trenchantly portrayed in *Hawes vs. Oakland*, (supra).

Under that decision, and under Rule 94, the plaintiff could not have sued in a Federal Court, and, because he could not have sued in a Federal Court, the defendants could not rightfully remove the case *to* a Federal Court.

Our contention shortly stated is this: That without the allegations required by Rule 94 there "is not a case in equity" made within the meaning of the Constitution and statutes of the United States as such cases have been defined and limited by the decision of this Court and by Rule 94; that the Circuit Court would have no original cognizance, and therefore the case was not removable.

THIRD: In the opinion of the Court below, reference is made to the rule of the decision of this Court "in "relation to the contract of carriage," a question of general commercial law, affecting the entire country, citing *Myrick vs. Mich. Cent. R. R. Co.*, 107 U. S. 109, Record p. 36. It is respectfully submitted that *N. Y.*

Cent. R. R. Co. vs. Lockwood, 15 Wall., 357, the leading case on that subject, is more to the point. The infirmity of the argument is that the case at bar is based on a tort, and does not at all involve any question of general commercial law.

The learned Circuit Judge says: "It seems to me "it would be a strange medley in the law, as adminis- "tered by the courts of the United States, to hold in this "class of cases, in administering equity where no local law or State statute, o State constitution is involved, "that a citizen of New York has a cause of action in "equity against a Minnesota corporation and a citizen of that state, cognizable and enforcable by the Circuit "Court of the United States sitting in New York, if he "commences his action in the State Court and it is "removed to the United States Circuit Court, but that "another citizen of the State of New York, on the same "facts and equities has no cause of action in equity, "cognizable and enforceable in the United States Circuit "Court sitting in New York, if such action is brought "in that Court in the first instance. This would make "his right of action and right of relief depend not on "the facts of the case, but on the Court in which he "commenced his action." (Record, p. 64.)

This language partially describes a class of cases with which members of the bar are familiar, and advise their clients accordingly. Plaintiffs choose and have the right to choose their forum. The case put by the Court below is no more anomalous than that a plaintiff should be deprived of his right of action, by the fact that the defendant removes the case into a court which could not have taken original cognizance of such a cause. If there is any hardship or anomaly in the case put by the Court below,

it is the result which has overtaken the plaintiff's suit, *and not the result of some other citizen's action in suing in the U. S. Circuit Court.* He would have done so with his eyes open—at least such is the legal presumption. It must be erroneous reasoning that will retain jurisdiction and dismiss such an action, removed from a State Court into a Federal Court, in order to maintain the uniformity and consistency of adjudication by the Federal Courts. That could be much better done, and more in accordance with sound legal reasoning, either by remanding the case, when moved thereto, upon the ground that the cause could not have been originally instituted in the Circuit Court, or in a case properly removable, by retaining the case on the ground of diversity of citizenship, and adopting as a rule of decision, the substantive law of the forum where the action was originally brought.

The opinion states that the Court is not pointed to any decision of the Court of Appeals of the State of New York holding a doctrine contrary to the doctrine held in *Hawes vs. Oakland,* and reiterated by Rule 94. (Record, p. 37.) The Court had previously stated the doctrine of the New York Courts:

> "It seems that in New York State the Courts give "equitable relief to a plaintiff, shareholder, who sues "in behalf of himself and all others, similarly situated "to enforce a cause of action *like this* which the cor- "poration itself might enforce for its own benefit, and "consequently for the benefit of its shareholders, but "will not, even if such plaintiff has no interest in "the corporation, or in the enforcement of the cause "of action at the time the wrong complained of was "committed, and his present interest has not de- "volved upon him by operation of law since." (Record, p. 29.)

The words "but will not" render the sentence ambiguous, even inconsistent. They were evidently dropped by a mere slip of the pen, as the cases cited by the Court, five of them from the Supreme Court of New York, and one of them from the Court of Appeals of New York, *fully sustain* the essential and correct proposition no doubt intended to be stated as to the law of New York that a plaintiff need not have owned his stock when the wrong was done. The cases cited by the Court below (Record, p. 30, at top), leave no doubt as to the Court's real meaning, and no doubt as to the law of New York.

The Court below reasons by analogy from the rule touching contributory negligence.

"Many State Courts, as those of New York, hold that a plaintiff in a negligence action, must allege and prove absence of contributory negligence. In the U. S. Circuit Court contributory negligence is an affirmative defense, and must be alleged and proved." (Record, p. 37.) Both these statements are quite correct. But when the Court adds: "This is the rule where the case is removed from the State Court to the Circuit Court," the statement must be taken only as an opinion. Three cases are cited: *R. R. Co. vs. Gladwood*, 15 Wall., 461; *I. & St. L. R. Co. vs. Horst*, 93 U. S., 291; *N. Pac. R. Co. vs. Mares*, 123 U. S., 710.

The Gladwood case was not a removed case. It came up to this Court by writ of error from the Supreme Court of the District of Columbia. The rule of decision was not discussed.

The Mares case came up to this Court by writ of error to the Supreme Court of the Territory of Dakota, and not by removal from a State Court. Nothing was said

in the opinion of this Court having any pertinence to the questions now under consideration.

The Indianapolis and St. L. R. Co. vs. Horst, was not removed from a State Court. It came up to this Court on writ of error to the Circuit Court in which the action was tried. The opinion of the Court discusses the statute of 1872, assimilating the pleadings and proceedings at law in the U. S. Courts, as near as may be, to those of the state in which the U. S. Court sits, and in disposing of an exception to the decision of the Court below, overruling a motion for a new trial, held that it was in the discretion of the Court below, and added: "It is therefore not within the Act of Congress of June 1, 1872, and cannot be affected by any state law upon the subject" (end of opinion). The cases cited do not sustain the dictum. The question was not raised.

In the opinion of the Court below the learned Judge, referring to *Hawes vs. Oakland* and Rule 94, says: "I think the rules laid down in that case are not local in their application, but general; that they constitute a general rule of equitable jurisprudence and equitable jurisdiction throughout the entire United States, and govern all like cases in the Circuit Courts of the United States, whether instituted there or removed thereto from a State Court." (Record, p. 37.)

If we change the above statement of opinion into an argument it would be somewhat as follows: (A) The statute gives the defendant the absolute right of removal on the ground of diverse citizenship. (B) The removal being accomplished it follows *ex necessitate*, that the law of the new forum must be applied to the case.

The statement of premise (A) is erroneous, because even if there were diversity of citizenship, the action

is not one that could have been brought in a Federal Circuit Court. But if it could be held otherwise, and that diversity of citizenship does give an absolute right of removal, no matter what the alleged cause of action, then the conclusion (B) does not follow. On the contrary, in cases innumerable, the Federal Courts give relief by following the laws of the state where they sit. The statute does *not* give the absolute right of removal on the mere ground of diverse citizenship. It gives the right of removal in cases of which the Circuit Court *could have taken original cognizance*, as a Court of the United States sitting in equity. Such jurisdiction does not depend wholly on diverse citizenship. It depends upon that *and* upon the allegation of facts calling into exercise the equitable cognizance of the Circuit Court.

In *Baxter, &c. vs. Hammond, &c.*, 154 Fed., 992, Judge Van Fleet says: "The Circuit Courts of the United States have no original jurisdiction on the ground of diversity of citizenship of a suit wherein neither party is a resident of the district in which the suit is brought, and hence *cannot acquire jurisdiction* of such a case by removal." In that case the Court had concluded to deny the motion to remand, but being referred to *ex parte Wisner*, 203 U. S., 449, discovered at once that under the rulings of this Court, the case before him must be remanded. In the Wisner case as in the Baxter case, the plaintiff and defendant were citizens of different states, but the suit was brought in a third state, of which neither was a citizen, and this Court ordered a mandamus to remand to the State Court.

The same principle held in the Baxter and Wisner cases was enforced in *Yellow Aster Min. & Mill. Co. vs. Crane Co.* (C. C. A.), 150 Fed., 580.

We thus have three decisions, one by a Circuit Court, one by a Circuit Court of Appeals, and one by this Court, that there is no jurisdiction of the person under the facts of those three cases. The Court had jurisdiction of the subject matter in all of them, but that was not sufficient. To have effective jurisdiction to hear and determine, the Court needed jurisdiction of the parties as well as of the subject matter. The converse of the rule must be held, that where the Court has no jurisdiction of the subject matter, although having jurisdiction of the parties, it has not jurisdiction to hear and determine.

POINT IV.

The Circuit Court being wholly without jurisdiction should have remanded the case to the State Court.

Existing statutes require: "If in any suit commenced in a Circuit Court, or removed from a State Court to the Circuit Court of the United States it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy within the proper jurisdiction of said Court * * * the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed as justice may require."

This is not discretionary. It is a command. The full section describes three classes of cases. Those originally brought in, and those removed to the Circuit Court, and those in which a collusive case has been made to give jurisdiction. The proper construction is that the

removed cases are to be remanded and the other two classes are to be dismissed.

In *Detroit vs. Dean*, 106 U. S., 537 (and other cases), this Court ordered bills originally brought in the Circuit Court to be dismissed because of collusion between the parties in trying to confer jurisdiction by an evasion of the requirements of Rule 94; but in each case the dismissal was without prejudice to the prosecution of an action in the State Courts.

The disposition of the case below should have been at least as favorable to the plaintiff as it was in the cases brought in the Circuit Courts, but tainted with collusion. The plaintiff should have been allowed to proceed with his cause of action in the State Court. An order to remand was the only way to accomplish this; to remand because the Circuit Court had no jurisdiction. It could not take cognizance of the case as presented by the bill in the State Court.

POINT V.

There are no decisions by this Court contrary to the appellant's contention.

So far as counsel, after a diligent examination of the decisions, is advised, there are but two cases to which reference need be made.

Doctor vs. Harrington, 196 U. S., 579.
Ill. C. R. Co. vs. Adams, 180 U. S., 28.

In *Doctor vs. Harrington* (supra), the point decided was that the fact that the legitimate interests of a corporate defendant may be the same as that of the complaining stockholders does not require, in arranging the

parties to a cause for the purpose of determining the jurisdiction of a Federal Court, invoked on the ground of diversity of citizenship, that such corporation be grouped on the side of the complainants where the bill alleges that the corporation is under a control antagonistic to complainants and is made to act in a way detrimental to their rights.

The report of the decision shows that the bill of complaint contained allegations of full compliance with all the requirements of Rule 94, and this was assumed both by counsel in the argument and by the Court in its decision.

In that case therefore all the prerequisites of jurisdiction required by Rule 94 were alleged in the bill, and this Court seemingly approved of the rule laid down in *De Neufville vs. N. Y. & D. R. R. Co.* (87 Fed. Rep., 10), to the effect that under such circumstances, *i. e., where full compliance with the requirements of Rule 94 were shown,* the defendant corporation could not be aligned on the same side as the complaining stockholders. Absolutely nothing was said in the opinion or necessarily follows from the decision which in any way affects the doctrine laid down in the cases referred to by us under *Point I* to the effect that where the bill does not set out compliance with all the requirements of Rule 94, the corporation must be aligned with the complainant.

In *Ill. C. R. R. Co. vs. Adams* (supra), the bill was dismissed by the Circuit Court for want of jurisdiction. This Court on appeal reversed the decree and remanded the case for further proceedings.

It is not quite clear from the report of the case how Rule 94 got into the discussion. It would seem from the

statements in the opinion, that the action was not brought by the plaintiff as a stockholder although it appears that it was a stockholder, and in fact the largest stockholder of the corporation on whose behalf it sued. The plaintiff, however, claimed the right to bring the bill upon the ground that it was the lessee of the property and a creditor and a mortgage bondholder of the Canton, Aberdeen & Nashville Railroad Company, whose property was sought to be taxed.

The requirements of Rule 94, therefore, would seem to be applicable only by analogy and not directly, as the application of that rule is by its express terms limited to actions brought by stockholders as such on behalf of the corporation.

The objection was raised, however, that the plaintiff had not complied with Rule 94 and that, therefore, the Court below had no jurisdiction; at least, that the plaintiff had no standing in Court.

The opinion, by Mr. Justice Brown, suggests that under the facts of that case, the 94th Rule did not raise a question of jurisdiction, but of the authority of the plaintiff to maintain the bill. "It may undoubtedly be "shown that the plaintiff had no right, under the allega- "tions of his bill, or the facts of the case, to bring suit, "but that is no defect of jurisdiction, but of title." And yet, having referred to diversity of citizenship and the amount in controversy and service within the proper district as elements of jurisdiction, the opinion adds: "Except certain quasi jurisdictional facts, necessary to "be averred in particular cases, *and immaterial here,* "these are the only facts required to vest jurisdiction of "the controversy in the Circuit Courts."

It is respectfully submitted that facts are either jurisdictional or not jurisdictional, and when admitted to be quasi jurisdictional, they are admitted to be sufficiently jurisdictional to defeat jurisdiction if omitted from a bill. The quasi jurisdictional facts referred to, and necessary to be averred in particular cases, would seem to be facts recited in, and required to be alleged by Rule 94. As these facts were "immaterial" in the case then under review, any discussion of the effect of their omission would not be controlling in the case at bar. The case in hand presents the fact of a good bill in a State Court becoming a defective bill in a U. S. Circuit Court by reason of omitting allegations not material in the State Court, and the result is not changed by saying that the omitted allegations are "no defect of "jurisdiction, but of title." The one is as important as the other. The title was good in the State Court, and became defective only upon removal to the Circuit Court.

Judge Brown also says:

"The objection that the plaintiff has failed to comply "with the 94th Rule may be raised by demurrer, but the "admitted power to decide this question is also an ad- "mission that the Court has jurisdiction of the case" (p. 35).

The admission would only go to the extent that every Court has the inherent and necessary power, or jurisdiction, if it must be so called, to dismiss a case of which it can take no equitable cognizance. But to say that a Court has jurisdiction of a case in the sense of having jurisdiction to pass on the merits, to hear and determine the case, because it has power to say that it can go no further in the case, has no power to grant

any relief, is confusing two different functions of the judicial office.

If the plaintiff had filed his bill in a Justices' Court, and the defendants had demurred, surely the power of that Court of very limited jurisdiction, to act on the demurrer, and to decide the question thereby raised, could not be held to be "an admission that the "Court has jurisdiction of the case." In the case at bar the plaintiff's motion to remand was in substance the same as a demurrer to the jurisdiction of the Court.

In any view of it Judge Brown's opinion is not pertinent here, because the question of the effect of *removal*, presented in the case at bar, was absent and not considered.

The whole weight of authority, including that of this Court is that the matter and facts required to be alleged by Rule 94 are jurisdictional. To any suggestion that Courts of the United States cannot either limit or enlarge their jurisdiction by an order of Court, but can only decide cases as presented, the answer is that upon this subject the decision of the Court preceded the rule, and the rule was the result of the decision in *Hawes vs. Oakland*. In that case, this Court said: "It is needless "to say that appellants' bill presents no such case as we "have here supposed to be necessary to the jurisdiction of "the (Circuit) Court." The language of this Court, "nec- "essary to the jurisdiction of the Court" is conclusive and covers the whole ground.

POINT VI.

The certified question of jurisdiction should be answered in the negative, and the decree dismissing the bill reversed, with directions to remand the case to the Supreme Court of the State of New York.

The Constitution and the statutes give to the Courts of the United States jurisdiction of causes, both in law and equity, on certain conditions of citizenship, amount, etc. This Court has held in *Hawes vs. Oakland* that in cases like that, and like the one at bar, certain facts are necessary to give *the Circuit Court jurisdiction.* Without those facts the Court has no power to act, can do nothing but refuse to act. In short, without those facts "a case in equity" has not been presented, nothing has been alleged to call into exercise the equitable cognizance, the final giving or refusal of equitable relief, by a Court of the United States sitting in equity. That is a failure of original jurisdiction, and under the statute there is now no removal without original jurisdiction, and there can be no acquisition of jurisdiction by removal.

It might well be held that Rule 94 has of itself no decisive operation or influence on the question under discussion, being only an expression by the Court of the substance of its own decisions. The decisions would govern, without the rule, in causes commenced in the National Courts. The whole matter resolves itself into a question of the relations to each other of the National and State Courts, under our dual system of government, a jurisdiction often, but not always co-ordinate. The question involves a consideration of the frame work and the

proper administration of a system, which, if not exceedingly complex, certainly cannot be called exceedingly simple.

Respectfully submitted,

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Supreme Court of the United States.

CLARENCE H. VENNER,
Appellant,
against
GREAT NORTHERN RAILWAY COMPANY and JAMES R. HILL.

October Term, 1907.
No. 485.

An Additional Authority.

The attention of the Court is respectfully called to the case of Gage and others *v.* Riverside Trust Company, Ltd., and others, reported in 156 Federal Reporter, page 1002, appearing in Advance Sheets, No. 9 of January 30th, 1908, which, it is submitted, is an authority on the question of the alignment of the parties.

This case appears to have been decided in December, 1906, but report of the case did not appear until in January, 1908, after the case at bar had been submitted to the Court.

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